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BAYANGAN SEPADU SDN BHD v. JABATAN PENGAIRAN DAN SALIRAN NEGERI SELANGOR & ORS

COURT OF APPEAL, PUTRAJAYA
HASNAH MOHAMMED HASHIM JCA
KAMALUDIN MD SAID JCA
B LEE SWEE SENG JCA
[CIVIL APPEAL NO: B-01(NCVC)(W)-328-05-2018]
24 AUGUST 2020

C **Abstract** – *A purchaser of a piece of land cannot, upon the discovery of certain structures on his land after purchasing the said land, claim that there is trespass to his land when he chose to sleep on his responsibility to take necessary steps to inspect the land and make inquiries before making the said purchase. [editor's note: there was appellate intervention to this case by the Federal Court vide [2022] 2 CLJ 1 FC whereof it was held that there was on the obtaining facts trespass unto the land]*

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E ***TORT:*** *Trespass – Trespass to land – Land purchased through public auction – Purchaser discovered existence of retention pond and structures on land after purchasing land – Whether existence of retention pond and structures justified – Whether purchaser took necessary steps to inspect land before making purchase – Whether doctrine of caveat emptor applied – Whether there was trespass*

F The present appeal concerned a piece of land purchased by the appellant ('plaintiff') through a public auction. According to the plaintiff, when it conducted a search, there was no indication that there was in existence a retention pond and permanent structures nor that the portion of the land had been surrendered to the respondents ('defendants') by the previous owners. Successful in his bid, the plaintiff purchased the land at RM3.66 million. The
G plaintiff carried out another land search and the search indicated that the retention pond and permanent structures were never surrendered to the defendants. A survey carried out by a land surveyor engaged by the plaintiff revealed that besides the retention pond and permanent structures, there were also Tenaga Nasional Bhd's substation, staff quarters, huts and storeroom on the land. The plaintiff commenced an action against the defendants at the
H High Court, seeking (i) an injunction restraining the defendants from trespassing; (ii) an order that the defendants remove the fence and/or other structures and restore the land to the condition in which it was before such fences and/or structures were erected or constructed; and (iii) an order that the defendants, jointly and/or severally, pay damages for trespass. The
I defendants, on the other hand, counterclaimed for (i) a declaration that the land belonged to the State of Selangor; (ii) an order that the defendants were

entitled to damages and the plaintiff to bear the construction cost of the retention pond; and (iii) exemplary damages. The High Court held that (i) the previous owners had given their consent and permission to surrender part of the land for the purpose of flood; and (ii) there was a valid surrender of the land to build the retention pond and the other structures. Regarding the counterclaim, the High Court awarded damages, interests and costs. Hence, the present appeal.

Held (dismissing appeal)
Per Hasnah Mohammed Hashim JCA (for the majority):

(1) The legal maxim *caveat emptor* or 'let the buyer beware' must necessarily apply to this case. The plaintiff, as the purchaser, should have inspected the land and make inquiries as to the property which it was proposing to bid. If the plaintiff omitted to ascertain whether the land as such as it had expected to be, the plaintiff could not complain upon discovering the existence of the retention pond and the structures. If the plaintiff had conducted a physical inspection of the land as required in the proclamation of sale, it was highly inconceivable that the plaintiff did not have sight of, not only the retention pond, but the structures built on the land. The searches conducted by the plaintiff at the land office were insufficient to reveal the actual physical landscape of the land; neither would they have revealed any existing structures built on the land. The plaintiff ought to have known, or otherwise deemed to have known, of the infrastructure on the land. Furthermore, the proclamation of sale had stated that the majority part of the land was covered by a lake or retention pond. (para 31)

(2) The entry upon the land could not be regarded as unjustifiable intrusion as it was with the consent of the previous owners that the land was surrendered to the third defendant. The land was surrendered to the defendants by the previous owners as part of the mitigation for severe flood. It would be ridiculous to acquire the land now after the retention pond had been built and maintained by the State Government for flood mitigation for the benefit of, not just one entity, but for the whole community, in particular the residents of the housing area and its neighbouring housing area. The plaintiff's claim against the defendants for trespass and damages was without basis and could not be sustained. (paras 34 & 36)

(3) The counterclaim had not been proved sufficiently by the defendants. Since the land had been surrendered to the third defendant and was placed under its supervision and maintenance, the cost of construction and maintenance of the retention pond and the structures must necessarily be borne by the third defendant. The High Court's decision with regard to the counterclaim, which was the award of damages, interests and costs, were set aside. (paras 39 & 40)

Per Lee Swee Seng JCA (dissenting):

(1) There could be no effective surrender of the land to the defendants as it had a charge registered in favour of the bank as security for a loan. It was precisely because they had defaulted that led the bank to realise its security in the charged land. Unless and until the charge was discharged, the land remained encumbered with a registered charge. The State, with the resources behind it, would be fully cognisant and aware that unless the land was free from all encumbrances, it could not be effectively surrendered to the State. There was no evidence of any attempts made to get the chargee's consent for the structure being built and the lake being created as a result of directing water to the land. (paras 58 & 59)

(2) It would be something rather basic that the State must take possession of the title to the land if at all there was to be a first step towards an effective surrender of the land to the State. It was not asked for as the title was with the bank. There could be no effective, valid and legal surrender of the land without complying with the requisite provisions of ss. 195 to 204H of the National Land Code ('NLC'). There was no such thing as an equitable surrender; at least not one that was binding on the plaintiff and anyone that later would become the subsequent proprietor to the land. There was no endorsement for more than 20 years since 1996 when the alleged surrender took place. The plaintiff did no less than four searches from 2009 to 2017 to ascertain the status of the said land to be free from all encumbrances and to be assured of its position in law. All the searches unmistakably showed that the defendants' interest in the lake and its structures were not registered against the land's register document of title and there was no record of any surrender of the land to the State. It could not be disputed that the defendants' interest was not reflected by way of registration against the land nor was there any caveat lodged and, certainly, no surrender of the land effected in favour of the State. (paras 75-78)

(3) The surrender of the land was not followed through by the parties and, indeed, no evidence of it having been commenced and continued to completion with the title of the land being surrendered to the State and the relevant endorsement made against the title. The chargee bank was still keeping the issue document of title which it had to deposit with the Land Administrator before the auction could proceed and, upon completion of the auction sale and the payment of the bid price, the issue document of title was then released to the successful bidder who had paid the bid price in accordance with the memorandum of sale. After the Land Administrator had issued the certificate of sale under the NLC, the title to the land would be registered in the name of the successful bidder, as indeed it had been so registered since 3 October 2011. (paras 85 & 86)

(4) There was nothing shown with respect to steps taken by the defendants to protect their own interest. A bidder, like the plaintiff, was not expected to know that there was this bit of history to the land and the lake, with its related structures on the land, and to have to take the land subject to these. Any conditions, restrictions or other impediments must be specified in the register document of title for the registered proprietor to be bound. The registered proprietor did not have to search or inquire elsewhere with respect to the antecedents of the land whether it be before in point of time or beyond the title with respect to events affecting the title; whether it be with the local authority or the utility companies or, for that matter, any department or bodies tasked with a public function like the first defendant. He did not even have to physically inspect the land. (paras 98 & 106)

(5) The defendants must have been aware of the charge in existence over the register document of title to the said land as a search would reveal this. They must then obtain either the consent of the chargee bank or, better still, a discharge of the charge before registering their interest against the land. They may create a registered lease against the land subject to the charge if the chargee bank agrees or procure the then registered proprietors to pay the chargee bank and obtain a discharge of charge and then effect a surrender of the land to the State or transfer it to the first defendant. Having failed to do that to protect the interest of the State, the defendants could not now be heard to prevail upon the court to nevertheless recognise their interests and have it enforced against the plaintiff who paid good consideration to purchase the land from the chargee bank in an auction sale conducted by the Land Administrator after an order for sale. (paras 121 & 122)

(6) Whilst it was true that the lake with its related structures had been on the land for more than 20 years, as far as the plaintiff was concerned, it had never consented to the defendants' structures to be on the land now in its name as the registered proprietor. The purchaser could not be paying the full purchase price and yet be excluded from the free enjoyment of the whole of the land which it had now become its registered proprietor of. The plaintiff may have bought the land at a bargain but that was no justification that it must then not complain or be heard, much less take action against the defendants for being deprived of use of some 14 acres occupied by the lake with its related structures. The plaintiff could not use or have access to the lake as it was fenced-off by the defendants and effectively the plaintiff was able to use only the balance three acres of land surrounding the lake. (paras 143-146)

(7) The State's stand was that they were validly on the land because the previous owners had allowed them into land and to do all works necessary for the flood mitigation project which saw the waters being directed into what could be now seen as the 14-acre lake in the 17-acre

land. Whatever the arrangement or even contract was between the previous proprietors and the defendants, it was for the defendants to enforce it against the previous proprietors. It did not affect the rights of registered ownership of the new proprietor. (paras 151 & 153)

(8) Where trespass was concerned it did not quite matter whether the trespasser was a State body or corporation. They had a team of legal advisers to advise them and if they had not taken the necessary steps to reflect their interests against the land then they could not be heard to complain that the new registered proprietor who bought the land at a public auction must recognise their interest because anyone having a cursory look at the said land would have seen the structures and systems put up by the State and its authorised bodies for a public purpose to mitigate flooding. It was for the State to go against the previous proprietors of the land but, as between the current new registered proprietor of the land, the defendants did not have the plaintiff's consent to occupy it nor to have its structures and systems with respect to flood mitigation to be on the land. (paras 176 & 177)

(9) The plaintiff's prayer, for a declaration that it was the registered proprietor of the land and that the defendants' flood mitigation lake and its related structures on the land constituted a trespass and that in any event compensation was payable by the defendants to the plaintiff for the presence of the lake (fenced-off by the defendants) and its related structures on the plaintiff's land, was allowed. The plaintiffs and the defendants were enjoined to discuss and agree on a reasonable rent or compensation to be paid to the plaintiff, failing which the plaintiff was at liberty, at the assessment of damages stage, within 30 days from the order of this court, to apply to the High Court Judge to determine a proper and reasonable lease rental or compensation based on the expert valuation reports that both the plaintiff and the defendants may produce before the High Court. At any time if the State should be of the view that to compulsorily acquire the land for a public purpose would be more economical in the long run, then they were at liberty to proceed accordingly. The damages to be assessed would be the loss of lease rental or compensation for the use of the part of the land occupied by these structures including the fenced off area of the lake. An order for assessment of damages for trespass was ordered or, alternatively, compensation to be paid by the defendants jointly and severally and that the matter be referred to the High Court Judge to assess damages or compensation. The defendant's counterclaim had to be correspondingly and consequentially dismissed and the order of the High Court was set aside. (paras 195-199 & 201)

Case(s) referred to:

Ahmad Shazilly Ismail Bakti v. Nik Salma Zaidah Hj Wan Mohd Zaid [2014] 5 CLJ 817 CA ***(refd)***

Associated Credit Corp Sdn Bhd v. Fahlum Development Sdn Bhd & Wong Phuan Foo [1990] 2 CLJ 952; [1990] 1 CLJ (Rep) 615 HC ***(refd)***

Bank Bumiputra Malaysia Bhd v. Mahmud Hj Mohamed Din & Anor [1989] 1 CLJ 1048; [1989] 1 CLJ (Rep) 326 HC ***(refd)***

Cahaya Ideal (M) Sdn Bhd v. Orang-Orang Yang Mengenali Diri Sebagai 'Ponga' & Ors [1999] 3 CLJ 257 HC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Hudson v. Nicholson [1839] 151 ER 185 ***(refd)***

Julaika Bivi v. Mydin [1961] 1 LNS 37 HC ***(refd)***

Konskier v. B Goodman Ltd [1928] 1 KB 421 ***(refd)***

Lee Hock Ning v. Government Of Malaysia [1972] 1 LNS 66 FC ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Majlis Amanah Rakyat (MARA) v. Tam Seek Hong & Ors [1994] 3 CLJ 64 HC ***(refd)***

Ngo Ong Chung & Ors v. Pengarah Tanah Dan Galian Perak Darul Ridzuan [2013] 1 LNS 146 HC ***(refd)***

Oh Hiam & Ors v. Tham Kong [1980] 1 LNS 53 PC ***(refd)***

One Visa Sdn Bhd v. Telekom Malaysia Bhd [2015] 10 CLJ 569 HC ***(refd)***

Pengarah Tanah Dan Galian Negeri Johor v. YKK (Malaysia) Sdn Bhd [2019] 7 CLJ 178 CA ***(refd)***

PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 1 LNS 55 FC ***(refd)***

Segar Restu (M) Sdn Bhd v. Wong Kai Chuan & Anor [1994] 4 CLJ 757 HC ***(refd)***

Sin Heap Lee-Marubeni Sdn Bhd v. Yip Shou Shan [2004] 4 CLJ 35 CA ***(refd)***

Suratmin Othman v. Yusof Omar & Ors [1998] 2 CLJ Supp 380 HC ***(refd)***

T Damodaran v. Choe Kuan Hin [1979] 1 LNS 107 PC ***(refd)***

Teh Bee v. K Maruthamuthu [1977] 1 LNS 134 FC ***(refd)***

Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd [2019] 1 CLJ 42 FC (refd)

Terra Damansara Sdn Bhd v. Nandex Development Sdn Bhd [2006] 8 CLJ 657 HC ***(refd)***

United Malayan Banking Corp Bhd v. Pemungut Hasil Tanah, Kota Tinggi & Another Case [1984] 2 CLJ 146; [1984] 1 CLJ (Rep) 51 PC ***(refd)***

Yap Lai Yoke v. Chin Fook Wah & Another Case [1984] 2 CLJ 282; [1984] 1 CLJ (Rep) 452 FC ***(refd)***

Legislation referred to:

Federal Constitution, art. 13

Government Proceedings Act 1956, ss. 29(1), 5, 6, 7(2)

Limitation Act 1953, ss. 6, 9

National Land Code, ss. 5, 57(2), 58, 89, 195(2)(b), 196(1)(c), (2)(a), 197, 198, 199, 200, 201, 202, 203, 204, 204A, 204B, 204C(1)(c), 204D, 204E, 204F, 204G, 204GA, 204H, 206, 207, 208, 209, 210, 211, 212, 215, 340(2), 301, 341, First Schedule Forms 12A, 12B

Public Authorities Protection Act 1948, s. 2(a)

Rules of Court 2012, O. 18 r. 19

Specific Relief Act 1950, s. 54

Other source(s) referred to:
Clerk & Lindsell on Tort, 20th edn, paras 19 to 29, pp 1223 to 1238
J G Fleming, *The Law of Torts* (Australia: The Law Book Co of Australia, 1957), p 45
Halsbury's Laws of England, 3rd edn, vol 34, p 212
Halsbury's Laws of England, 4th edn, vol 45, para 1384, p 631
M A Jones*, Clerk & Lindsell on Torts*, 21st edn (London: Sweet & Maxwell, 2014) p 1371

For the appellant - Leong Wai Hong, Richard Kok Chi Wei & Tan Ko Xin; M/s Rhiza & Richard
For the respondents - Siti Fatimah Talib; SLA & Etty Eliany Tesno; SFC

[Editor's Note: This case is a republication of the Court of Appeal judgment of Bayangan Sepadu Sdn Bhd v. Jabatan Pengairan dan Saliran Negeri Selangor & Ors [2020] 10 CLJ 321. We apologise that the judgment was published without the minority judgment and we have published the full judgment here.
For the High Court judgment, please see Bayangan Sepadu Sdn Bhd v. Jabatan Pengairan Dan Saliran Negeri Selangor & Anor [2018] 1 LNS 1440 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Hasnah Mohammed Hashim JCA (majority):

[1] This appeal arose from the decision dated 27 April 2018 in respect of a piece of land described as HS(M) 20109, Lot PT 18903, Mukim Klang, Tempat Bukit Kemuning, Daerah Klang ("the land"). We heard the oral submissions of the respective counsel for the parties and upon evaluating both the oral and written submissions as well as considering the learned Judicial Commissioner's ("JC") grounds of judgment ("GOJ"), by majority, we found no merits in the appeal to warrant our intervention and dismissed the appeal with costs. We now give our full reasons for deciding so.

[2] For the purpose of this judgment, the parties will be referred to as they were in the High Court.

Material Facts

[3] We summarised the material facts as follows. In the High Court the plaintiff had sought the following reliefs:

(i) an injunction restraining the defendants from trespassing;

(ii) an order that the defendants remove the fence and/or other structures and restore the land to the condition in which it was before such fences and/or structures were erected or constructed;

(iii) an order that the defendants, jointly and/or severally, pay damages for trespass on the land from 25 March 2011 or a date the court deems fit to the date the defendants cease trespass; and

(iv) interest and costs.

[4] The defendants, on the other hand, had filed a counterclaim against the plaintiff and had sought the following reliefs:

(i) a declaration that the land belongs to the State of Selangor;

(ii) an order that the defendants are entitled for damages and the plaintiff to bear the construction cost of the retention pond;

(iii) exemplary damages; and

(iv) interest and costs.

[5] The land which is in dispute was previously jointly owned by Newacres Sdn Bhd and Bumi-Murni Sdn Bhd ("the previous owners"). The plaintiff had on 25 March 2011 purchased the land by a public auction conducted by the Klang Land Office. The judicial sale was on the application of the chargee bank, CIMB Bank Berhad ("CIMB"). The proclamation of sale dated 25 March 2011 described the land and provided salient particulars of the land. The plaintiff conducted a search, however, it is contended by the plaintiff that the search did not show the existence of the retention pond and the structures built on the land neither did it indicated that the portion of the land had been surrendered to the defendants by the previous owners. The plaintiff successfully bid for the land in the public auction and purchased the land for RM3.66 million. After the auction, the plaintiff carried out another land search on 4 May 2011 which, according to the plaintiff, indicated that the portion of the land where the retention pond and the structures were built was never surrendered to the defendants.

[6] Sometime in July 2011, the plaintiff engaged a licensed land surveyor to conduct a survey of the land. The survey revealed that the retention pond was on the land and that there were also other permanent structures on the land; a Tenaga Nasional Bhd (TNB) substation, staff quarters, huts and storeroom ("the structures") surrounding the retention pond which form part of the land, about 9.554 acres out of 17.49 acres. The plaintiff confirmed that the certified plan of the land with the Department of Survey and Mapping Malaysia shows that the retention pond is part of the land and that the defendants had fenced up and erected the structures next to the retention pond. The plaintiff had written a letter dated 27 September 2013 to the first and second defendants requesting for information and documents to justify the defendants' occupation of the land.

[7] In response, by a letter dated 25 October 2013, the first defendant explained that they were in the process of collecting the relevant documents as well as information with regards to the project and the retention pond on

A the land. The plaintiff was informed that a meeting would be called to discuss the matter once the relevant documents/information were obtained. Subsequently, by a letter dated 11 September 2014, the first defendant wrote to Klang Land Administrator to apply to enter a registrar's caveat on the land and the caveat was subsequently entered on 19 September 2014.

B **[8]** On 10 December 2014, the plaintiff filed an application in the Shah Alam High Court *via* Originating Summons No. 24-1381-12-2014 ("OS") against the first and second defendants for discovery to provide necessary documents to justify the defendants' occupation on the land. The High Court allowed the OS on 23 July 2015.

C **[9]** The defendants then lodged a police report (No. SEK9/002493/15) on 11 March 2015, stating that they were unable to locate the project file namely "Projek Rancangan Tebatan Banjir Taman Sri Muda Seksyen 25 Shah Alam" and intended to gather documents and plans from Majlis Bandaraya Shah Alam ("MBSA").

D **[10]** To support its claim that the portion of the land was surrendered to the third defendant, the following documents were produced:

(i) a copy of official search and Form 11B for the land (pp. 63 to 66, bundle B);

E (ii) letter dated 16 September 1996 by Newacres Sdn Bhd to MBSA (p. 70, bundle B);

(iii) site plan, location plan and source plan (p. 71, bundle B); and

(iv) layout plan dated 8 June 2006 (p. 74, bundle B).

F **[11]** Despite the documents as stated above, the plaintiff's solicitors wrote to the first defendant on 16 March 2017 and demanded an irrevocable and unconditional undertaking among others, the delivery of vacant possession of the land and removal of the fence and structures within three days. The plaintiff then proceeded to file the suit on 20 March 2017. The defendants G then filed an application for striking out under O. 18 r. 19 of the Rules of Court 2012 (ROC) on 26 October 2017 but the application was withdrawn and the matter proceeded for trial.

[12] The defendants justified the occupation of the land based on the H following documents:

(i) A letter dated 21 August 1996 from YY Woo Akitek ("YYW") to MBSA where the previous owners, had appealed against a reduction in "density" by stating that 41% of the project, ie, a portion of a land measuring 14 acres had been "surrendered" to build a retention pond.

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(ii) A letter dated 16 September 1996 to MBSA from the previous owner had agreed to build and surrender the retention pond to MBSA for maintenance thereafter, as a condition to receive planning permission.

(iii) A letter dated 24 July 1997 from one Ahmad Zamri bin Kamaruddin, Ketua Jabatan Perancang Bandar of MBSA to YYW informing that MBSA has imposed a condition for the construction of a retention pond for development on Lot 18908.

(iv) The layout plan of "Cadangan Pembinaan Kediaman, Asrama, Kompleks Sukan dan Kolam Tadahan Air di atas Lot 38618" was approved on 26 September 1996 and registered on 18 July 1997.

(v) A letter by MBSA dated 20 April 2006, in respect of planning permission on Lot 38618.

[13] The agreed issues before the JC in the High Court are as follows:

(i) Whether there was a valid surrender of a part of the land which according to the defendants measures approximately 14 acres by the previous owners of the land to the State Authority of Selangor to build a retention pond and its structures.

(ii) Whether the retention pond and the structures that were built on the land which according to the defendants measuring approximately 14 acres belonged to the State Authority of Selangor.

(iii) Whether the plaintiff when he bought the land is subject to the terms and conditions of the auction sale, in particular cl. 18 of the proclamation of sale.

(iv) Whether the defendants are trespassing on the land by occupying and/or continue to occupy the retention pond and the structures.

(v) Whether the plaintiff's action is amounting to laches and/or barred by s. 2(a) of the Public Authorities Protection Act 1948 and/or ss. 6 and/or 9 of the Limitation Act 1953, and/or against ss. 5, 6 and/or 7 of the Government Proceedings Act 1956.

[14] The learned JC decided to address both the issues in paras. (i) and (ii) in the main claim together as the issues are intricately interlinked, that is, the validity of the surrender of the land by the previous owners to the State Authority of Selangor and, the ownership of the retention pond together with the structures built on the land measuring approximately 14 acres, that is whether they belong to the third defendant.

[15] The learned JC was satisfied that there was sufficient evidence to support that the previous owners had given their consent and permission to surrender part of the land for the purpose of constructing the retention pond

to prevent the recurrence of flood in Taman Sri Muda area. By the letter dated 16 September 1996, the previous owners had undertaken to build the retention pond at their costs and upon completion, hand over the retention pond to the local authority. The letter dated 16 September 1996 was not disputed by the plaintiff. Learned JC gave her reasons in her GOJ as follows:

> [22] I am satisfied that there are sufficient evidences (*sic*) to support that the previous owners had consented and given their permission to surrender part of their land for the purpose of constructing the retention pond. By the letter dated 16 September 1996, the previous owners undertake to build the retention pond at their own costs and upon completion will hand over to MBSA for the maintenance process. The letter dated 16 September 1996 (B3 pp. 7 & 8) was not disputed on their existence and the plaintiff agreed that the document to be put in Part B …
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> [23] I also took cognisance (*sic*) of the layout plan at p. 74 of bundle B which support the facts that:
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> (a) the letter dated 16.9.1996 was taken into consideration for the purpose of amendment to building plan/planning permission as per the title of that letter of that letter at p. 7 of bundle B3, signed by the director of previous owners.
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> (b) the council meeting of MBSA had approved the project with the layout plan on 26.9.1996 as per the endorsement therein. The layout plan was registered on 18.7.1997 as PELAN NO: MPSA/PRG/PT 25C-3-97 FAIL NO: MPSA/PRG/2016-96 (25C) TARIKH 18.7.1997.
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> (c) the layout plan was based on the letter by MPSA dated 24 July 1997, referring to the endorsement on the plan which stated that "Pelan ini adalah berdasarkan surat (30) MPSA/PRG/2016-96 (25C) bertarkh (*sic*) 24.7.1997'.
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> (d) the land involved in this case is PT 18903 which at that time presumably formed part of "Lot PT 18909 and Lot 82" which originally Lot 38618, referring to the title namely "Pindaan Pelan Tatatur Kepada Pelan Kelulusan No. JPBK B4/18/87/PD Bertarikh 25hb Mac 1987" and project title "Cadangan Pembangunan Kediaman Asrama Komplek Sukan Dan Kolam Tadahan Air Diatas Lot 38618 (34 Ekar) Disebahagian Seksyen 25, Shah Alam, Selangor Darul Ehsan Untuk Tetuan Bumi Murni Sdn. Bhd.", and
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> (e) Subsequently, after meeting on 24 October 1997, previous owners had no objection on the placement of the retention pond and the construction of the retention pond had been completed in 1998, (refer to minutes of meeting at pp. 88-89).

[16] The previous owners had surrendered the land to MBSA for the retention pond to be constructed to prevent the recurrence of flood. The previous owners in its letter had stated Lot 18909 instead of Lot 18903. However, the previous owners had never objected to the construction of the retention pond on Lot 18903. From 1997 until the date of auction on 25 March 2011, there was no evidence, oral or documentary of any objection of the construction of the retention pond on Lot 18903. Based on the oral and documentary evidence before her the learned JC found that that there was valid surrender of the land (approximately 14 acres) to build the retention pond as well as the other structures.

[17] The plaintiff through the evidence of Lee Hoy Voon, the plaintiff's director (PW1) admitted that the plaintiff knew of the existence of the retention pond before the auction. Based on both documentary and oral evidence before her, the learned JC concluded that the plaintiff had "… full knowledge and even accepted the location and description of the land including the retention pond which covered the major part of the land has been surrendered to the State of Selangor." (see para. 33, GOJ). Therefore, the defendants did not commit an act of trespass as alleged by the plaintiff.

[18] Before us, the plaintiff's complaints, *inter alia*, were as follows:

(i) the register document of title for Lot 18903 shows that the plaintiff is the owner and does not show that the defendant has any registered interest. Therefore, the register document of title is conclusive of ownership;

(ii) the retention pond and the structures built on Lot 18903 was wrongly built on Lot 18903. The defendant had entered and build on the wrong lot;

(iii) CIMB as the chargee never consented to the transfer;

(iv) the previous owners had never validly transfer the Lot 18903;

(v) this is a case of continuing trespass by the defendants;

(vi) the terms and conditions of the auction cannot be relied on by the defendants;

(vii) the previous owners failed to construct the retention pond and the structures as proposed when the planning permission was obtained. The defendants had proceeded to wrongly entered and built the retention pond on the wrong lot of the plaintiff's land; and

(viii) Lot 18903 has not been validly transferred to the defendants to construct the retention pond and the structures as CIMB's consent as the chargee was never obtained as required under s. 204 of the National Land Code ("NLC").

A **Our Decision**

[19] Before dealing with the issues raised, it is necessary to set out and to summarise the essential legal principles.

[20] We are mindful of the limited role of the appellate court in relation
B to findings of facts made by the court of first instance. The general principle is that the conclusion of a trial judge is a finding of fact on the oral evidence based on the demeanour and credibility of the witnesses before him or her. Generally, such finding ought not to be disturbed unless the appellate court is convinced that it is plainly wrong. It would not be sufficient to warrant
C any interference merely because the appellate court entertains doubt whether such finding is right (see *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309). Having set out the legal principles underlying appellate intervention, we now turn to the facts of the present case.

D **[21]** The appeal before us was basically against the above finding of the learned JC. As alluded to earlier, the issue before this court is whether the defendants had committed trespass by wrongly entering and proceeding to construct the retention pond on the wrong lot. It is the plaintiff's case that Lot 18903 has never been validly transferred or surrendered to the
E defendants to construct the retention pond and the structures as CIMB's consent as the chargee was never obtained as required under s. 204 of the NLC.

[22] Trespass according to the author of *Halsbury's Laws of England*, 4th edn, vol. 45, para. 1384, p. 631 is unlawful entry on a property which is in
F possession of another:

> Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, even though no actual damage is done. A person trespasses upon land if he wrongfully sets foot on it, rides or drives over it or takes possession of it, or expels the person in
G possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or if he erects or suffers to continue on his own land anything which invades the airspace of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land on to another's land.

H **[23]** The passage found in at p. 1223 of the text of *Clerk & Lindsell on Tort* (20th edn), describes trespass as:

> ... any unjustifiable intrusion by one person upon land in the possession of another.

I

[24] In *Segar Restu (M) Sdn Bhd v. Wong Kai Chuan & Anor* [1994] 4 CLJ 757; [1994] 3 MLJ 530 Abdul Malik Ishak J (as he then was) explained who is a trespasser: A

> In law, a trespasser is one who wrongfully enters on land in the possession of another, and has neither right nor permission to be on the land. Lord Dunedin in *Robert Addie & Sons (Collieries) Ltd v. Dumbreck* [1929] AC 358 at p 371 aptly described a trespasser as one "who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or if known, is practically objected to". B

[25] The Federal Court in through the judgment of Mohd Zawawi Salleh FCJ in *Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd* [2019] 1 CLJ 42 said: C

> Put simply, trespass onto land is the unlawful direct and immediate interference with the possession of land which is in the possession of another person, or which another person is entitled to possession of. A Latin maxim is frequently employed to define the extent of land: "*cui us est solum, eius est usque ad coelum et ad inferos*" – he who owns the land, owns it all the way to the heavens and to hell. This principle is often referred to in its abbreviated form as *ad coelum* principle. In modern law, this principle is still accepted in limited form, and rights are divided into space rights and subsurface rights below. D

[26] As confirmed by the authoritative text of *Clerk & Lindsell on Tort* (*supra*) pp. 1236 to 1238, paras. 19 to 29, entry upon a land is not trespass if it is justifiable: E

> **An entry upon the claimant's land is not a trespass if it is justifiable**. Justification of the entry may be afforded either by operation of law, or by the act of the claimant **or of his predecessors in title**, where the entry is made under a right of easement or of *profit a prendre*, or under a licence, and a like rule applies where persons deviate on to private land because the owner of such land has obstructed a right of way adjacent thereto ... F
>
> (emphasis added)

[27] The learned Senior Federal Counsel submitted that the said land was surrendered to the defendants by the previous owners. In support of this argument, the defendants relied on the letter dated 16 September 1996. For ease of reference we reproduced the letter dated 16 September 1996 written by the previous owners to the defendants declaring unequivocally and unconditionally that they were prepared to build the retention pond on the said land in order to overcome the flood issues in Taman Muda Shah Alam; and that upon completion the said land will be surrendered to the defendants: G H I

A

B

NEWACRES SDN BHD (COMPANY NO. 36121-V)

1st Floor Wisma Equity 150 Jalan Ampang 50450 Kuala Lumpur Tel: 2626888 / 2625133 / 2618911 Fax: 2614195

Rujukan Tuan : MPSA/PRG/2016-96(25C)
Rujukan Kami : NEW/312/ASL (c)

C

16hb September 1996

Majlis Perbandaran Shah Alam
Jabatan Perancang Bandar
Tingkat 2, Wisma MPSA
Persiaran Perbandaran
40675 Shah Alam
Selangor Darul Ehsan

D

(U/P : En. Ahmad Zamri B. Kamaruddin)

Tuan,

E

PERMOHONAN MENDAPATKAN KELULUSAN PERANCANGAN BAGI CADANGAN PINDAAN PELAN TATATUR DI ATAS LOT PT 18909 DAN SEBAHAGIAN LOT 82, SEKSYEN 25, SHAH ALAM UNTUK TETUAN NEWACRES SDN BHD DAN BUMI MURNI SDN BHD

Dengan hormatnya saya diarah merujuk kepada perkara di atas.

F

Untuk maklumaan tuan, pihak kami telah memperuntukkan tanah seluas 14.0 ekar (sila rujuk pelan disertakan) kepada majlis untuk cadangan pembinaan Kolam Tahanan sebagai sumbangan kami bagi mengatasi banjir di Taman Sri Muda.

G

Seterusnya pihak kami, juga dengan pembiayaan sendiri menanggung kos perbelanjaan pembinaan Kolam Tahanan tersebut. Pembinaan tersebut akan dimulakan sebagai Fasa I selaras dengan pembinaan Fasa ke II rancangan mengatasi banjir oleh pihak majlis. Pembangunan kediaman di sekitar kawasan Tadahan akan dibangunkan sebagai Fasa II setelah siap pembinaan kolam tersebut.

Setelah siapnya cadangan pembinaan Kolam Tahanan tersebut, pihak kami akan menyerahkan tapak berkenaan kepada pihak majlis untuk proses penyelenggaraan.

H

...2/-

DITERIMA 17 SEP 1996

I

[28] The land described as PT 18903 in the proclamation of sale formed part of Lot PT 18909 and Lot 82, originally Lot 38618. The proclamation of sale in relation to the auction of the land had warned explicitly to all members of the public who had intended to bid at the public auction of the said land to amongst others, conduct an official title search at the relevant land office. The warning was bold and underlined:

NOTE: All intending bidders are advised to conduct an official title search at the relevant land office and to inspect the subject property before the commencement of the auction sale.

~~135~~
437

PROCLAMATION OF SALE

ORDER FOR SALE AT THE REQUEST OF CHARGEE

PTK.15A/239/2003

In the matter of section 263 and section 265(5) of the National Land Code 1965

CIMB BANK BERHAD	BETWEEN	CHARGEE
NEWACRES SDN BHD DAN BUMI MURNI SDN BHD	AND	CHARGORS

In the matter of an Order of Pentadbir Tanah Daerah Klang, Selangor Darul Ehsan made herein on the 19.7.2005, 8.10.2009, 12.5.2010, 3.8.2010 and 7.2.2011 it is hereby proclaimed that the Pentadbir Tanah Daerah Klang with the assistance of the undermentioned Auctioneer will sell by

PUBLIC AUCTION

ON FRIDAY THE 25TH DAY OF MARCH 2011 AT 10.00 A.M
IN THE AUDITORIUM 2ND FLOOR, PEJABAT DAERAH/TANAH KLANG
JALAN KOTA, 41902 KLANG, SELANGOR DARUL EHSAN

NOTE: All intending bidders are advised to conduct an official land search at the relevant Land Office and to inspect the subject property before the commencement of Auction sale.

PARTICULAR OF PROPERTY ACCORDING TO VALUATION REPORT:

TITLE NO	:	HSM 20109
LOT NO	:	PT 18903
MUKIM/DISTRICT/STATE	:	Klang/Klang/Selangor Darul Ehsan
LOCALITY	:	Bukit Kemuning
TENURE	:	Leasehold 99 years (Expiring date : 1TH October 2089)
PROVISIONAL LAND AREA	:	70,816,0907 square metres (762,283 square feet)
ANUAL RENT	:	RM10,214.00
CATEGORY OF LAND USED	:	Bangunan /Building
EXPRESS CONDITION	:	Bangunan Kediaman /Residential Building
RESTRICTION IN INTEREST	:	Tanah yang diberi milik ini tidak boleh dipindah milik, digandai atau dipajak melainkan dengan kebenaran Pihak Berkuasa Negeri.
REGISTERED OWNERS	:	NEWACRES SDN BHD AND BUMI MURNI SDN BHD - 1/1 share
ENCUMBRANCES	:	Charged to CIMB BANK BERHAD via presentation No. 4182/1999 Vol. 498. Fol. 28 dated 4th August 1999. Private Caveat lodged by Sun Rock Development Sdn Bhd via Presentation No: 4299/2010 dated 28th September 2010

LOCATION AND DESCRIPTION OF PROPERTY

The subject property comprises a parcel of development land held under title no. HSM 20109, PT 18903, Mukim of Klang, District of Klang, State of Selangor Darul Ehsan. The land is located at Jalan Cekal 25/34, Taman Sri Muda, Seksyen 25, 40000 Shah Alam, Selangor Darul Ehsan. It is located approximately 35 kilometres due south-west of Kuala Lumpur city centre and is about 10 kilometres due south of Shah Alam city centre. It is accessible from Shah Alam city centre via Persiaran Tengku Ampuan, Persiaran Perusahaan, Persiaran Budiman, Jalan Gemilang 25/1, Jalan Tokoh 5/28 and finally turning onto Jalan Cekal 25/34 leading to the subject property. That a retention pond/lake which was covered major part of the subject property.

A

RESERVE PRICE

The subject property will be sold subject to a reserve price of RM3,608,550.00 (RINGGIT MALAYSIA: THREE MILLION SIX HUNDRED EIGHT THOUSAND FIVE HUNDRED FIFTY ONLY) and subject to the conditions of sale as mentioned in the proclamation of sale. All intending bidders shall deposit 10% of the reserve price in a form of Bank Draft made in favour of CIMB BANK BERHAD before 10.00 am on the date of auction and the balance of purchase price shall be settled in full within one hundred and twenty (120) days from the date of sale to the solicitors MESSRS AZIM, TUNKU FARIK & WONG in favour of CIMB BANK BERHAD.

B

For further particulars please apply to the PENTADBIR TANAH DAERAH KLANG or to the solicitors MESSRS AZIM, TUNKU FARIK & WONG, whose address is at Unit 5-03, 5th Floor, Straits Trading Building, 2 Lebuh Pasar Besar, 50050 Kuala Lumpur. Tel: 03-2697355 (Ref 5.74.4658) or the undermentioned Auctioneer.

C

SYED AUCTIONEER
No. 44, Jalan Tun Teja 3,
Taman Tun Teja,
8000 Rawang,
Selangor Darul Ehsan,
Tel: 03-60922714/012-3171973

SYED FAKHRI B. SYED MUHAMMAD AZZIDDIN
Licensed Auctioneer
e-mail : syed_auctioneer@yahoo.com
SA/1035/09/PTK/SBB

(emphasis added)

D **[29]** In addition to conducting a title search, interested bidders were also advised to inspect the subject property. It is also stipulated that there is a retention pond covering a major portion of the land. Condition 18 of the proclamation of sale stipulated as follows:

> E Hartanah ini adalah dipercayai dan hendaklah dianggap sebagai diperihalkan dengan betul dan dijual tertakluk kepada semua ismen, caveat, tenansi, tanggungan dan hak (jika ada) yang wujud di atas atau terhadapnya tanpa apa-apa tanggungan yang timbul untuk mengtakrifnya dan tiada kesilapan, pernyataan khilaf atau perihal khilaf boleh membatalkan jualan ini dan tiada bayaran gantirugi dibenarkan mengenainya.

F **[30]** The legal maxim *caveat emptor* is succinctly stated in *Halsbury's Laws of England,* 3rd edn, vol 34 at p. 212:

> G ... the rule is; a purchaser should make inspection and inquiry as to that which he is proposing to buy. If he omits to ascertain whether the land is such as he desires to acquire, he cannot complain afterwards on discovering defects of which he would have been aware if he had taken ordinary steps to ascertain its physical condition; and, although as a general rule a vendor must deliver property corresponding to the description contained in the contract, yet an error in the particulars or description of the property in the contract is not a ground of objection if it is readily corrected on inspection.

H **[31]** The legal maxim *caveat emptor* or let the buyer beware, must necessarily apply to this case before us. The purchaser, in this case, the plaintiff should have inspected the land and make inquiries as to the property which it was proposing to bid. If the plaintiff omitted to ascertain whether I the land is such as it had expected it to be, the plaintiff cannot upon discovering the existence of the retention pond and the structures erected on the land, complains. If the plaintiff had conducted a physical inspection of the land as required in the proclamation of sale, it is highly inconceivable

that the plaintiff did not have sight of not only the retention pond but the structures built on the disputed land in question. It is the proverbial "elephant in the room"; unmistakably difficult not to miss. The searches conducted by the plaintiff at the land office were insufficient to reveal the actual physical landscape of the land neither would they have revealed any existing structures built on the land. The plaintiff ought to have known, or otherwise deemed to have known of the infrastructure existing on the land. The plaintiff must have been aware if the plaintiff had taken reasonable steps to ascertain the physical condition of the land. As a general rule, a vendor must deliver property corresponding to the description contained in the contract, yet an error in the particulars or description of the property in the contract is not a ground of objection if it is readily corrected on inspection. The proclamation of sale had stated that the majority part of the land in questioned is covered by a lake or retention pond.

[32] The evidence gleaned from the records of appeal reveals that there was no evidence of any objection raised by the previous owners as to the construction of the retention pond on Lot 18903 even though the previous owners' letter dated 16 September 1996 to MBSA had stated a different lot, that is Lot 18909. Aniza binti Osman, Pegawai Perancang Bandar MBSA (DW6) explained the background of the planning permission that was approved and granted by MBSA:

> J: Pemilik asal iaitu Tetuan Newacres Sdn Bhd dan Bumi-Murni Sdn Bhd lebih kurang pada tahun 10.04.1996 telah mengemukakan permohonan untuk mendapatkan kelulusan perancangan bagi cadangan pindaan pelan tataatur daripada Majlis Perbandaran Shah Alam (MPSA) ketika itu melalui perunding arkitek iaitu Tetuan Y.Y. Woo Akitek. Oleh yang demikian, kelulusan telah diberikan pada 26.09.1996 dan telah dimaklumkan kepada perunding melalui surat bertarikh 24.07.1997 dengan syarat-syarat tertentu dan salah satu syarat ialah kolam perlu dibina dan diserahkan kepada MPSA.
>
> S: Kemudian apakah tindakan yang diambil oleh Tetuan Newacres Sdn Bhd dan/atau Tetuan Y.Y. Woo Akitek?
>
> J: Tetuan Y.Y. Woo Akitek melalui surat pada 21.08.1996 telah mengemukakan rayuan untuk menaikkan densiti dengan alasan sebahagian daripada Tanah tersebut iaitu seluas 14 ekar telah diserahkan kepada Kerajaan. Selanjutnya Tetuan Newacres Sdn Bhd melalui surat pada 16.09.1996 juga telah mengesahkan penyerahan tanah seluas 14 ekar kepada Kerajaan untuk pembinaan kolam takungan.

[33] *Vide* a letter dated 24 July 1997, Ahmad Zamri bin Kamaruddin, Ketua Jabatan, Perancang Bandar of MBSA informed the previous owners' architect, YY Woo Akitek, that MBSA had imposed a condition for the construction of a retention pond on Lot 18908. This was followed by a meeting to further discuss the prevention of the recurring floods in Taman

Sri Muda area. Cheremi bin Tarman, Pengarah Kejuruteraan MBSA (DW2) testified that a meeting was held on 24 October 1997 to discuss the steps to be taken to solve the recurrence of flood in Taman Sri Muda area as well as the new layout plan for the placement of the retention pond:

> Saya telah mempengerusikan satu mesyuarat Projek Pencegahan Banjir di Taman Sri Muda Seksyen 25, Shah Alam Selangor Darul Ehsan - Fasa 2 pada 24.10.1997 yang mana dihadiri oleh pihak dan agensi teknikal yang terlibat antaranya JPS, Jurutera Daerah, Jabatan Pengairan dan Saliran Daerah Klang, **wakil-wakil pemilik asal Tetuan Newacres Sdn Bhd** dan Kontraktor JPS bertujuan untuk menyelaraskan Projek Rancangan Tebatan Banjir Fasa 1 dan 2. Dalam mesyuarat tersebut, pemilik asal iaitu Tetuan Newacres Sdn Bhd **tiada halangan untuk pembinaan kolam takungan banjir di tempat yang dicadangkan** oleh JPS dan MBSA dan oleh yang demikian, telah diputuskan kedudukan kolam takungan banjir di tempat tersebut. (emphasis added)

[34] By a letter dated 5 July 2016 issued to the plaintiff, confirmed that the planning permission on the land was still enforceable as the retention pond has been built as per the conditions of the planning permission. It would have been an ideal option then if the land owned by the previous owners was acquired by the defendants for the purposes of building the retention pond. However, instead due to the severity of the flood issues the land was surrendered to the defendants by the previous owners as part of the action for flood mitigation. It would be quite ridiculous to acquire the land now after the retention pond has been built and maintained by the State Government for flood mitigation for the benefit of not just one entity but for the whole community, in particular the residents of the Taman Sri Muda Shah Alam housing area, including the residents of the housing area nearby.

[35] In the case of *One Visa Sdn Bhd v. Telekom Malaysia Bhd* [2015] 10 CLJ 569 the court held that:

> The plaintiff purchased the lands on the basis of "as is where is" as evidenced by the proclamation of sale for the public auction. The application of "as is where is" was in relation to the plaintiff's purchase of the lands according to its existing condition. The plaintiff ought to have known or was otherwise deemed to have known about the exercise of the defendant's infrastructure and of any squatters prior to the purchase of the lands … As such, the plaintiff's claim against the defendant for trespass and damages pursuant to it with regards to the presence of the squatters on the lands was without basis and could not be sustained.

[36] We agreed with the learned JC that the entry upon the land cannot be regarded an unjustifiable intrusion as contended by the plaintiff as it was with the consent of the previous owners that the land was surrendered to the third defendant. Thus, we are of the considered view that the plaintiff's claim against the defendants for trespass and for damages is without basis and cannot be sustained.

[37] After having heard the parties at length and upon careful perusal of the records of appeal, we find no appealable error to warrant our intervention. In the circumstances, and for the reasons we have given, we are of the considered opinion that there was a valid surrender of the land, approximately 14 acres by the previous owners to the defendants to build the retention pond and the structures.

The Counterclaim

[38] Turning now to the counterclaim, we feel it necessary if we reproduce the counterclaim filed by the defendants:

(i) a declaration that the land belongs to the State of Selangor;

(ii) an order that the defendants are entitled for damages and the plaintiff to bear the construction cost of the retention pond;

(iii) exemplary damages; and

(iv) interest and costs.

[39] Since the land has been surrendered to the third defendant and under its supervision and maintenance, the cost of construction as well as the maintenance of the retention pond and the structures erected thereon must necessarily be borne by the third defendant.

Conclusion

[40] In the light of the above settled principles and after having heard the parties at length and upon careful perusal of the records of appeal, in the circumstances, and for the reasons stated, we are of the unanimous view that the appeal must be allowed in part. We find no merit to intervene in the learned JC's decision on the validity of the surrender of the land to the third defendant. That decision is affirmed. However, in respect of the counterclaim, we are satisfied that the claims have not been proved sufficiently by the defendants. We, therefore, do not award any damages. The learned JC's decision with regards to counterclaim, that is, the award of damages, interests and costs are set aside. The other orders of the High Court dated 27 April 2018 are affirmed. Costs of RM20,000 to be paid to the defendants. Deposit to be refunded.

Lee Swee Seng JCA (dissenting):

[41] The core issue in this appeal is whether a successful bidder at an auction sale under the National Land Code ("NLC") must recognise the interest of a person, even if it be a State corporation, not duly registered against the title to the land now duly registered in the successful bidder's name.

[42] The issue would once again test the limits of a registered proprietor's rights *vis-a-vis* a prior unregistered interest in the title. Does the Torrens system of land registration as we know it recognise such an unregistered interest against a subsequent registered proprietor who has no contract with the current occupier of the land whose structures and fixtures are on the land?

[43] The material facts necessary to once again answer the above questions are not substantially in dispute.

[44] The plaintiff bought the land in question held under HS(M) 20109, Lot PT 18903, Mukim Klang, Tempat Bukit Kemuning, Daerah Klang ("the land") at a public action conducted by the Land Administrator at the land office pursuant to an order for sale. What happened was that the chargee bank CIMB had proceeded with an order for sale after the proprietors had defaulted in their loans with the bank.

[45] The registered proprietors of the land were Newacres Sdn Bhd and Bumi-Murni Sdn Bhd. They were the developers who were supposed to develop a housing estate which plans had been approved subject to them setting aside a piece of designated land identified as Lot PT 18909 and part of Lot 82, Seksyen 25, Shah Alam for use as a flood mitigation plain for flood prevention in the area where there had been constant flooding each time there was heavy rain.

[46] For some reasons the development was not proceeded with but the defendants proceeded to exact the requirement from the developers seeing that what they had developed continued to suffer from constant flooding whenever there was a heavy downpour.

[47] Instead of the flood mitigation pond being on the designated land, it was finally built in 1996 on the current land, the subject matter of this suit, with the result that there was a lake of about 14 acres in a slight oval shape with staff quarters, huts, storeroom, pumps and pipes and a Tenaga sub-station together with a fence round the lake to prevent trespassers from entering the lake area. These shall be collectively referred to as "the lake with its related structures".

[48] The construction was done by the defendants for apparently the developers had reneged from their promise to construct the flood mitigation pond and the defendants had to take over. The need was pressing as the residents there had constantly complained of the flooding that had caused them tremendous hardship.

At The High Court

[49] The plaintiff had prayed for an injunction to restrain the defendants from trespassing onto the land and also for an order for removal of the structures erected by the defendant on the land. It had also prayed for damages to be assessed for the trespass and that the defendants be made jointly and severally liable to pay.

[50] The defendants had counterclaimed for a declaration that the land belongs to the State and for an order that the defendants are entitled to damages and further that the plaintiff to bear the construction costs of the lake and its related structures and for exemplary damages.

[51] For completeness the first defendant is Jabatan Pengairan dan Saliran Negeri Selangor and the second defendant is Pengarah Jabatan Pengairan dan Saliran Negeri Selangor. The third defendant is the Government of the State of Selangor Darul Ehsan ("the State").

[52] The defendants' argument which found favour with the learned Judicial Commissioner ("JC") as the trial judge was that ·there was an effective surrender of the land to the State as part of the terms for planning permission granted to the previous proprietors for flood control.

[53] The learned JC was convinced that there was no trespass by the defendants as the consent of the previous proprietors had been obtained and that the plaintiff was aware of the physical existence of the defendants' structures on the land with the lake and as the purchase was on an "as is where is" basis the plaintiff has no right to complain against the defendants for trespass.

[54] The learned JC had dismissed the plaintiff's claim and allowed the defendants' counterclaim with damages to be assessed.

[55] Aggrieved by the decision of the High Court the plaintiff had appealed to this court and the main grounds of appeal are considered below.

[56] The parties shall be referred to as they were on the High Court ie, as plaintiff and defendants.

Whether There Was A Valid Surrender Of The Said Land To The State

[57] The evidence led was that the land to be surrendered to the defendants as part of the planning permission was Lot 18908/Lot 38618 and not Lot 18903, which lot is the land that the plaintiff is suing for possession and which the plaintiff had bought in a public auction sale under the NLC.

[58] There could be no effective surrender of the land to the defendants as it had a charge registered in favour of CIMB Bank as security for a loan. Unless and until the charge is discharged the land remained encumbered with a registered charge. The State with the resources behind it would be fully cognisant and aware that unless the land is free from all encumbrances, it cannot be effectively surrendered to the State.

[59] The proprietors of the land who were the developers of the said Taman Sri Muda, Shah Alam, had charged the land to CIMB Bank. It was precisely because they had defaulted that led the bank to realise its security in the charged land. There was no evidence of any attempts made to get the chargee's consent for the structure being built and the lake being created as

A a result of directing water to the land. In any event no consent of the chargee had been adduced in court and neither did the defendants call anyone from the chargee bank to testify.

[60] The "surrender of title" is found in Part Twelve of the NLC from ss. 195 to 204H. One thing is clear as provided for in ss. 196(1)(c) and
B 196(2)(a) NLC in that the consent in writing of the chargee must first be obtained irrespective of whether the surrender is with respect to the whole or a part only of any alienated land. See particularly s. 204C(1)(c) where no surrender and re-alienation shall be approved by the State Authority unless there are no registered interests in the land.

C

[61] As the land is held under land office title the approval shall be by the Land Administrator under s. 195(2)(b) NLC. There are prescribed forms to be filled under the NLC for this purpose, which for a land office title as is the case here, either Form 12A in the case of a surrender relating to the whole of the land or Form 12B in relation to a part only of the land, is to be used
D for the application to surrender the land to the State.

[62] It is pertinent to note that in either case the consent in writing from the chargee and the issue document of title must accompany the said application made to the Land Administrator. No evidence had been led that
E either of these applications in the requisite form had been made to the Land Administrator.

[63] Assuming for a moment that for some reasons the land to be surrendered by the previous proprietors to the State had then become the said land, there was no evidence that the consent of the chargee bank was sought
F and obtained. The fact remains that the written consent of the chargee bank had not been given and the issue document of title was still with the chargee.

[64] Indeed if the consent had been given by the chargee bank then the charge would have been discharged by either the previous proprietors paying back the loan of which the charge was the security or that another piece of
G land had been provided for a charge to be created as security in place of said land.

[65] No one from the defendants gave any evidence of steps they had taken to obtain an unencumbered title to the land so that the land may be effectively surrendered to the State or that at the very least the chargee had
H given its written consent to the surrender of the land and had released the title for the said purpose.

[66] If the surrender of the land had been effected to the State, the public auction could not have proceeded under the eyes of the Land Administrator as the issue document of title would have been surrendered to the land office
I for cancellation together with the charge.

[67] The file related to this project and the so-called surrender of the land had mysteriously gone missing by the time the defendants wanted to search for it to answer the queries of the plaintiff with respect to the nature of the defendants' interest on the said land. That is rather disturbing to say the least.

[68] Files do not simply go missing for otherwise the public would have little confidence in the State's record of transactions and agreements on lands for the purpose of planning permission and proper development so that the public is not made to suffer each time there is flooding and more so when monies had been spent by the State for the purposes of flood mitigation.

[69] There is clearly the presence of egregious element within the State administration that had not discharged their duties with due diligence in safeguarding the interest of the State for the benefit of the citizenry where this project is concerned. Surely it cannot escape the defendants that whatever is the piece of land to be surrendered to the State for the purpose of creating a flood mitigation lake of some 14 acres complete with its related structures that consists of the paraphernalia of the pumps and pipings as well as the staff quarters and fencing surrounding the lake and the TNB station, steps must be taken to ensure that it is free from all encumbrances so that the interests of the State may be secured and safeguarded.

[70] If the intention was that the previous proprietors should have surrendered the land then one would have expected that at the very least a Registrar's caveat to have been entered against the land pending the previous proprietors' efforts to discharge the land of the registered charge.

[71] The State had little difficulty doing this when it discovered that the relevant files had gone missing after the plaintiff had written to them as the new registered proprietor but alas that had come too late in the day.

[72] It is a case where no one followed through with a proper monitoring of the development of the flood mitigation project after the previous proprietors had failed to construct the flood mitigation lake with its related structures in the land said to be surrendered to the State for this purpose.

[73] The file had gone to sleep from the completion of the flood mitigation project in late 1990s to when the land was publicly auctioned off on 25 March 2011 and even beyond that until the plaintiff wrote to the defendants to enquire of their structures on the land.

[74] SD3 Encik Azman bin Yahya, the deputy director of the first defendant, reluctantly admitted under cross-examination that the surrender of the land, or for that matter, any change of condition of land use to the land could not been effected as the issue document of title to the land was with CIMB Bank. See appeal record vol. 2, p. 199.

[75] It would be something rather basic that the State must take possession of the title to the land if at all there was to be a first step towards an effective surrender of the land to the State. It was not asked for as the title was with the bank as any search on the title would reveal.

[76] There can be no effective, valid and legal surrender of the land without complying with the requisite provisions of ss. 195 to 204H NLC. There is no such thing as an equitable surrender; at least not one that is binding on the plaintiff and anyone that later would become the subsequent proprietor to the land. As submitted by learned counsel for the plaintiff there was no endorsement for more than 20 years since 1996 when the alleged surrender took place. The plaintiff wanted to be very sure that it was not seeing the wrong entries against the said land title and so did no less than four searches from 2009 to 2017 to ascertain the status of the said land to be free from all encumbrances and to be assured of its position in law.

[77] The searches were carried out on 15 July 2009 (appeal record, vol. 3A, pp. 446 to 447), on 4 May 2011 (appeal record, vol. 3A, pp. 448 to 450), on 30 November 2016 (appeal record, vol. 3A, pp. 497 to 500) and on 11 May 2017 (appeal record, vol. 3A, pp. 382 to 383).

[78] All the searches unmistakably showed that the defendants' interest in the lake and its structures were not registered against the land's register document of title and there was no record of any surrender of the land to the State. SD3 Encik Azman bin Yahya confirmed under cross-examination that there was no surrender of the lake and its structures to the defendants nor was there any caveat lodged based on the said land title search made on 16 June 2014 and 11 May 2017. Indeed it cannot be disputed that the defendants' interest was not reflected by way of registration against the land nor was there any caveat lodged and certainly no surrender of the land effected in favour of the State.

[79] The fact that the chargee bank could obtain an order for sale from the Land Administrator and proceed with a public auction of the land carried out by the Land Administrator would further underscore the fact that there had been no surrender of the land to the State.

[80] SP2, the licensed land surveyor, called by the plaintiff, gave evidence that the previous proprietors had not surrendered any part of the said land to the State as recorded in the appeal record, vol. 2, pp. 268 to 269 and where the said land had been surrendered the fact of the surrender would be reflected in the official land search and that it would have been preceded by a Form 12A NLC showing an application to surrender had been made.

[81] SP2 further testified that had there been a valid and legal surrender of the land then there would be no way in which the land could have been sold through a public auction through an order for sale made by the Land

Administrator and there were no less than six orders for sale made by the Land Administrator to sell the land *via* public auction from 2005 to 2011. See appeal record, vol. 3A, pp. 470 to 480.

[82] When one looks at the proclamation of sale of the land it expressly included the retention lake under the subheading of "location and description of property" and not a case where the lake of 14 acres with its related structures had been excluded from the sale as in a separate title having been issued for the lake with the defendants being the registered owner.

[83] SD5 Puan Nor Azlina binti Mamat from the Klang Land Office confirmed that for the purposes of the public auction pursuant to an order for sale issued by the Land Administrator there was nothing stated of any part of the 17 acres land had been surrendered to the State and indeed it was stated that a huge part of the said land is a lake of about 14 acres.

[84] If indeed there had been any surrender of the land to the State, it is only good in contract, and it is for the defendants to enforce it *in personam* against the previous owners and nothing in the nature of an action *in rem* against the land that would have the effect of affecting the registered ownership of the plaintiff who bought the land at the public auction.

[85] The surrender of the land, assuming for a moment that there was such an intention by the previous proprietors and the defendants, was not followed through by the parties and indeed no evidence of it having been commenced and continued to completion with the title of the land being surrendered to the State and the relevant endorsement made against the title.

[86] The chargee bank CIMB Bank was still keeping the issue document of title which it had to deposit with the Land Administrator before the auction could proceed and upon completion of the auction sale and the payment of the bid price the issue document of title is then released to the successful bidder who had paid the bid price in accordance with the memorandum of sale. After the Land Administrator had issued the certificate of sale under the NLC, the title to the land would be registered in the name of the successful bidder, as indeed it had been so registered since 3 October 2011.

Whether The Plaintiff As Registered Proprietor Pursuant To A Certificate Of Sale Must Recognise The Interest Of The Defendants In The Flood Mitigation Lake With Its Related Structures When These Are Not Registered Against The Title

[87] There was also no attempt made to reflect the interest of the defendants against the land whether it be in the form of a lease on the affected parts where the lake with its related structures are or otherwise.

[88] The plaintiff made a few searches before deciding to bid for the land at the public auction under the NLC. There was no encumbrance shown nor caveats reflected against the land other than the charge created in favour of

CIMB Bank. The proclamation did say that bidders are advised to make a physical inspection of the land and that the land is sold on a "as is where is" basis. All that expression means is that the successful bidder upon becoming the new registered proprietor cannot complain to the chargee bank that the land has structures or obstacles not registered or reflected against the land but that it has to take all necessary action, including legal if necessary, to assert its right of ownership over and against all who are on the land without its consent.

[89] The expression "as is where is basis" does not mean that the successful bidder is buying the land subject to the interest of other occupiers who may have erected some structures on the said land. It does mean that the successful bidder would have no recourse against the chargee bank for all the costs, losses and expenses incurred in asserting its right of ownership over the land.

[90] The plaintiff decided to put in its bid and it was successful. The certificate of sale was issued and it later became its registered proprietor on 3 October 2011.

[91] Thereafter the plaintiff wrote to the first and second defendants to enquire as to its interest in the land as the plaintiff said that its enquiries point to the fact that the lake with its related structures to be that of the first defendant.

[92] The first defendant took quite a while to reply, more than six months. It is likely that it had to check back with the personnel previously in charge of this project especially when record-keeping is not clear. The first defendant finally responded by saying in gist that the previous proprietors had agreed to the land to be surrendered to the State for the purpose of the use as a flood mitigation lake to ensure no flooding in the housing estate.

[93] When queried further as to why the title's particulars were different, the first defendant did not explain except to maintain that even the said land had been surrendered to the State for the public purpose of flood mitigation and related works.

[94] The question is whether the land can be surrendered when the registered chargee's consent had not been obtained. The answer is a resounding "no"! The chargee bank before giving up its security for whatever had been the loan taken would want to have an equivalent piece of land to secure the loan given. Little wonder that there was no evidence of consent being forthcoming from the chargee bank that the defendants could produce.

[95] Even if the previous proprietors were working to get the consent of their chargee bank there was no evidence of this as the defendants did not subpoena them to testify. The previous proprietors, we were told from searches made at the CCM, had been wound up.

[96] The question is why wasn't the defendants' interest in the said land being registered? If it is a case where the previous proprietors could not get their chargee bank to consent to the creation of a lease than some other pieces or unencumbered land had to be surrendered by them to the defendants.

[97] If it is a case where the previous proprietors were working to repay the loan and the charge be discharged, then in the meanwhile the defendants could have written to the Registrar of land titles to enter a Registrar's caveat for the time being so that a proper surrender of the land can be effected once the charge has been discharged.

[98] There was nothing shown with respect to steps taken by the defendants to protect their own interest. One does not expect a bidder like the plaintiff at a public auction to know that there is this bit of history to the land and the lake with its related structures on the land and to have to take the land subject to these.

[99] What the plaintiff had done is what would have been expected by prudent bidders and purchasers. It made several official land searches to see if anyone had an interest on the land or whether some caveats had been lodged to give notice to the world at large as to the caveator's right to interest or title to the land they were keen to buy.

[100] The basic tenet of the Torrens system is that the title is everything and it encapsulates two principles. One is the mirror principle and the other the curtain principle.

[101] By the mirror principle is meant that the issue document of title is a reflection of what is the position of one's interest or title on the land as shown in the register document of title kept at the land office for anyone to do a search by the payment of the requisite fee. Any caveats lodged against the said land would immediately cause the land office to inform the registered owner and chargee about it.

[102] The curtain principle further underscores the fact that the title being everything, one is not required to look behind the title to see the antecedent transactions and to wonder if they had been validly entered into. The moment one becomes the registered proprietor of a piece of land reflected in its title, one's title is indefeasible and is immune from challenge against the whole world save for the exceptions set out in s. 340(2) NLC.

[103] These two principles are encapsulated into ss. 89, 206 and 340 NLC with respect to the conclusiveness, recognition and indefeasibility of title or interest that is registered against the land.

[104] Thus in *Suratmin Othman v. Yusof Omar & Ors* [1998] 2 CLJ Supp 380; [1997] MLJU 203 it was observed as follows:

> The administration of land in Malaysia is based entirely in the Torrens System which provides for the registration of titles, all claims and interests in land. The National Land Code, 1965 ("NLC") contains detailed

provisions and procedures for the registration of titles, claims and interests in land. The provisions in the NLC incorporate the 'curtain' and 'mirror' principles that persons dealing with the registered owner of the land need not be concerned by doing an investigation to ascertain the validity of the information pertaining to the land as shown on the register and the circumstances under which such proprietor came to be registered. The register mirrors, with exactitude, the registered proprietor of the land and its conclusive subject to certain exceptions of which I have more to say in a moment. The effect of registration is simply to defeat all prior unregistered claims.

[105] The conclusiveness of one's title upon registration is captured in s. 89 NLC as follows:

> Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be **conclusive evidence**:
>
> (a) that title to the land described therein is vested in the person or body for the time being named therein as **proprietor**; and
>
> (b) of the conditions, restrictions in interest and other provisions subject to which the land is for the time being held by that person or body, so far as the same are required by any provision of this Act to be specified or referred to in that document.
>
> (emphasis added)

[106] Any conditions, restrictions or other impediments must be specified in the register document of title for the registered proprietor to be bound. The registered proprietor does not have to search or inquire elsewhere with respect to the antecedents of the land whether it be before in point of time or beyond the title with respect to events affecting the title; whether it be with the local authority or the utility companies or for that matter any department or bodies tasked with a public function like the first defendant. He does not even have to physically inspect the land because the official search done on the register document of title perfectly mirrors what is on the land with respect to title, interest, conditions, restrictions or any other impediments that he must recognise or be binding on him.

[107] The Federal Court in *Teh Bee v. K Maruthamuthu* (*supra*) reiterated the conclusive of the register document of title as follows at p. 12:

> The importance of the register document of title in terms of Section 178(3) of the Code read with section 89 is that it is conclusive evidence that the title to the land in question is vested in the appellant ...
>
> There is also another much more important reason why this appeal should be allowed. **Under the Torrens System the register is everything**. So said S.K. Das on page 102 of his book on the Torrens System in Malaya. I need only refer to two Privy Council cases, *Creelman & Anor v. Hudson Bay Insurance Company* [1920] AC 194 and *Alan Frederic Frazer v. Douglas Hamilton Walker* [1967] 1 AC 569 which decided to the same effect.

In *Creelman & Anor. v. Hudson Bay Insurance Company* which was an appeal from British Columbia, Lord Buckmaster delivering the judgment of the Judicial Committee said on page 197:

> Their Lordships are unable to accede to either of these propositions. In their opinion the certificate of title referred to in section 22 of the Land Registry Act is a certificate which, while it remains unaltered or unchallenged upon the register, is one which every purchaser is bound to accept. And to enable an investigation to take place as to the right of the person to appear upon the register when he holds the certificate which is the evidence of his title, would be to defeat the very purpose and object of the statute of registration.

In *Alan Frederic Frazer v. Douglas Hamilton Walker* which was an appeal from New Zealand Lord Wilberforce said on p. 580:

> **It is in fact the registration and not its antecedents which vests and divests title.** (emphasis added)

[108] In *Bank Bumiputra Malaysia Bhd v. Mahmud Hj Mohamed Din & Anor* [1989] 1 CLJ 1048; [1989] 1 CLJ (Rep) 326; [1989] 1 MLJ 381 and *Associated Credit Corp Sdn Bhd v. Fahlum Development Sdn Bhd & Wong Phuan Foo* [1990] 2 CLJ 952; [1990] 1 CLJ (Rep) 615 the courts there held that the registration of the charges have the effect of defeating the prior unregistered claims of the interveners.

[109] In *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 LNS 55; [1980] 2 MLJ 136 (FC) Raja Azlan Shah CJ (Malaya) (as His Majesty then was) observed:

> The concept of indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it. **Therefore the registration of the transfer of the said land under the National Land Code defeats all prior unregistered interests in that land** ... (emphasis added)

[110] Prudence might constrain him to physically inspect the land but if there be any discrepancies between what he sees on the land and what is registered against the title, then what is registered against the title would prevail as the title is everything.

[111] He does not have to worry or bother of someone else's contractual rights as that would not be binding on him as he is not privy to the contract and more so because that would be ineffective in creating, transferring or affecting title or interest without the proper instrument of dealing being executed and registered against the register document of title. Section 206 NLC undergirds the importance of registration of a registrable title or interest as follows:

> Subject to the following provisions of this section:
>
> (a) every dealing under this Act shall be effected by an instrument complying with the requirements of sections 207 to 212; and

A (b) *no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, until it has been registered under Part Eighteen.*

(emphasis added)

B **[112]** Thus while a party aggrieved may have a cause of action in contract against a party in breach of it in the failure to transfer title or interest or to create some interest in the land as may be permitted under Part Eighteen of the NLC, that is an action *in personam* and it does not affect the land in an action *in rem* the moment a third party becomes the new registered proprietor or acquires a registered interest in the land.

C **[113]** An unregistered or unregistrable interest can only bind the parties to the contract and this was explained by the Privy Council in *Oh Hiam & Ors v. Tham Kong* [1980] 1 LNS 53; [1980] 2 MLJ 159 at p. 164 as follows:

D The Torrens system is designed to provide simplicity and certitude in transfers of land, which is amply achieved without depriving equity of the ability to exercise its jurisdiction *in personam* on grounds of conscience.

[114] The cornerstone and certainty of the Torrens system of title by registration is captured in s. 340 NLC as follows:

E (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

[115] One's title or interest is good against the whole world and immune from challenge unless any one of the vitiating factors in s. 340(2) NLC has
F been proved.

[116] As far back as 1979 in the Privy Council case of *T Damodaran v. Choe Kuan Hin* [1979] 1 LNS 107; [1979] 2 MLJ 267b, Lord Diplock succinctly summarised the quintessential of the NLC as follows at p. 269 C-G:

G The National Land Code applies to Malaysia the Torrens System of registration of title to land. The whole purpose of the system is to get away from the complicated system of rules which in England regulate dealings with land, particularly those relating to such matters as notice of encumbrances and trusts. As was said by the Court of Appeal of New Zealand in relation to the corresponding New Zealand legislation, the
H Land Transfer Act, 1885:

> *The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against*
I *all the world. Nothing can be registered the registration of which is not expressly authorised by the statute.* Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest. *Fels v. Knowles* [1906] 26 NZLR 604, 620.

> In the National Land Code it is section 340 that expressly provides that the title of a person registered as proprietor of any land shall be indefeasible. *The only exceptions are where there has been fraud, misrepresentation, forgery or an ultra vires acquisition purporting to have been made under statutory authority*. None of these exceptions apply to the instant case. Interests in land, short of proprietorship, which are capable of being registered are *leases, charges and easements*. If registered they would amount to encumbrances within the meaning of a covenant against encumbrances; but *unless registered they do not derogate from the unencumbered title of the registered proprietor of the land* ... (emphasis added)

[117] There has been no suggestion that any one of the vitiating circumstances exist in this case where the plaintiff had bought the land *via* a public auction conducted by the Land Administrator. The vitiating factors are fraud, forgery, void or insufficient instrument and where the transfer is prohibited by law.

[118] In *Cahaya Ideal (M) Sdn Bhd v. Orang-Orang Yang Mengenali Diri Sebagai 'Ponga' & Ors* [1999] 3 CLJ 257 it was held as follows:

> The property has since been transferred and registered in the name of the plaintiff. In accepting the transfer of the property, the plaintiff holds it subject to "other registered interests" as envisaged in s. 215(3)(a) of the NLC. *Once the plaintiff became registered as the proprietor of the property, the title became indefeasible under s. 340 of the NLC and the plaintiff has a title which was free of all adverse claims or encumbrances not noted on the register* (*Punca Klasik Sdn Bhd v. Liza James & Ors* (*supra*)). Lord Diplock in *T Damodaran v. Choe Kuan Hin* [1979] 1 LNS 107; [1979] 2 MLJ 267b PC held that the only exceptions to the principle of indefeasibility would be in situations where there were fraud, misrepresentation, forgery or an *ultra vires* acquisition purporting to have been made under statutory authority.
>
> In my judgment, none of these exceptions apply to the present case ...
>
> (emphasis added)

[119] The court in *Majlis Amanah Rakyat (MARA) v. Tam Seek Hong & Ors* [1994] 3 CLJ 64; [1994] 2 AMR 1296 said at p. 68 (CLJ); p. 1304 (AMR):

> **Under our Torrens System the register is everything**. Upon registration, the party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land (s. 340(1) of the National Land Code), that is, a title or an interest which is free of all adverse claims or encumbrances not noted on the register. I might as well mention that registration under the National Land Code is effected when a prescribed memorial of the dealing is made on the register document of title under the hand and seal of the registering authority (*Mohammad bin Buyong v. Pemungut Hasil Tanah, Gombak & Ors* [1981] 1 LNS 114; [1982] 2 MLJ 53).
>
> (emphasis added)

[120] Granted there may be a lapse of time between the creation of one's title or interest under contract and the effective registration of that title or interest because of the practical necessities like approval of board, finalisation of loan and time for payment of balance purchase price, or an existing charge to be discharged or even the waiting for adjudication of *ad valorem* stamp duty and its payment before the instrument of transfer or creation of the interest may be registered. For that the NLC has provided a system of giving notice to the world *via* relevant caveats that may be lodged such that the caveator's right to title or interest in the land may be known to all who may have an interest in the land and a land search of the register document of title would easily and readily disclose the presence of any caveat lodged.

[121] In this case the defendants must have been aware of the charge in existence over the register document of title to the said land as a search would reveal this. They must then obtain either the consent of the chargee bank or better still a discharge of the charge before registering their interest against the land. They may create a registered lease against the land subject to the charge if the chargee bank agrees or procure the then registered proprietors to pay the chargee bank and obtain a discharge of charge and then effect a surrender of the land to the State or transfer it to the first defendant.

[122] Having failed to do that to protect the interest of the State, the defendants cannot now be heard to prevail upon the court to nevertheless recognise their interests and have it enforced against the plaintiff who paid good consideration to purchase the land from the chargee bank in an auction sale conducted by the Land Administrator after an order for sale.

[123] The plaintiff does not have to know the antecedents of the land or make enquiries as to why there is a lake on it. The plaintiff merely needs to make an official search on the land that it is keen to purchase from the chargee bank at the public auction.

[124] To prevail upon the plaintiff as the new proprietor to have to recognise the interest of the defendants on the land would be to dilute and denude the NLC of its essence and efficacy in the certainty that comes with registration and the integrity of the Torrens system of title by registration where the title and anything that may be registered and reflected on it is everything!

[125] That would be to allow serious inroads to be made affecting the integrity of title by registration as proclaimed and indeed protected by s. 340 NLC.

[126] It would be to create further exceptions than that which has been provided for under s. 340(2) NLC. Any prospective buyer of a piece of land would have to inquire and investigate beyond the register document of title to search at the local authority office with respect to planning permission

approved and a physical survey and study of the land. The efficacy and efficiency of the Torrens system would be effectively eroded. The integrity of the Torrens system would be impaired and certainty in the system would crumble once its core is tampered with.

[127] In *United Malayan Banking Corp Bhd v. Pemungut Hasil Tanah, Kota Tinggi & Another Case* [1984] 2 CLJ 146; [1984] 1 CLJ (Rep) 51; [1984] 2 MLJ 87 (PC) it was observed at p. 56 (CLJ); p. 91 (MLJ) that:

> The National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidents of it, as well as other important matters affecting land there, and there is no room for the importation of any rules of English law in that field except in so far as the Code itself may expressly provide for this.

[128] In the case of a charged land as is the case here, once the chargee bank has been paid the auction price of the land, it no longer has any interest in the land and more than that, the title and interest in the land would pass to the successful bidder the moment it becomes the new registered proprietor.

[129] Even if the State has a residual of discretion not to approve the transfer *via* a certificate of sale issued by the Land Administrator that would not be effective in preventing registration because there is no restriction in interests reflected on the title. Assuming for a moment there is a restriction in interest that would still be ineffective in preventing the transfer *via* a certificate of sale for the bidder would have paid the full purchase price and there cannot be a total failure of consideration by virtue of s. 301 NLC. Section 301 NLC states that:

> An instrument shall be fit for registration under this Part if, but only if, the following conditions are satisfied:
>
> (a) that it is one of the classes of instrument set out in sub-section 292(1) as authorised to be so registered;
>
> (b) that it complies with:
>
> (i) the provisions of Part Thirteen as to the form, content, execution and attestation of instruments of dealing generally, and the persons and bodies capable of taking thereunder, and
>
> (ii) the provisions of Parts Fourteen to Seventeen with respect to instruments of the particular class in question;
>
> (c) that the dealing which it effects is not contrary to any prohibition or limitation imposed by this Act or any other written law for the time being in force, or to any restriction in interest to which the land in question is for the time being subject;
>
> (d) that it does not declare or, except as permitted by section 344, disclose the existence of any trust; and
>
> (e) that it is duly stamped in accordance with the provisions of the Stamp Act 1949:

A *Provided that where a certificate of sale has been given to a purchaser in respect of any charged land or lease under sub-section 259(3) or subsection 265(4), any requirement to obtain the consent of the State Authority relating to the restriction in interest to such land or lease in question shall not be applicable.* (emphasis added)

B **[130]** The whole purpose of the amendment that introduced the proviso was to provide certainty in a public auction sale and to take away the State's discretion not to give consent to the transfer pursuant to a certificate of sale issued pursuant to a full purchase price being paid in a public auction of a charged land.

C **[131]** Otherwise banks would have no certainty that they can realise their security after having taken a legal charge for the loan given.

[132] The defendants' remedy is against the previous proprietors of the land and if they had been wound up as we were told, then the defendants must suffer for their lackadaisical attitude in failure to protect the interest of the
D State and its people who have a legitimate expectation that any development of land should be such that flooding should not take place each time there is a heavy downpour as is not uncommon in Malaysia.

Whether There Is Continuing Trespass From The Date The Plaintiff As
E **The New Registered Proprietor Gave Notice Of Trespass To The Defendants**

[133] The defendants contended that they had the consent of the previous proprietors to put up the structures on the land and to fence off the entire lake area meant for flood mitigation. The previous proprietors of the land were
F not called to corroborate the said consent. Assuming for a moment that they had consented to the structures being erected on the land and the entire lake area being fenced off, the question is whether the consent of the previous proprietors bind the current registered proprietor of the land.

[134] The learned author M A Jones of *Clerk & Lindsell on Torts*, 21st edn
G (London: Sweet & Maxwell, 2014) at p. 1371 opined that where consent was given by the previous landowner and the land is subsequently transferred, as a general rule, the previous owner's consent is not binding on the subsequent owner so as to afford a defence to trespass as against the subsequent owner. This is so at common law even if the subsequent owner bought the land with
H express notice.

[135] Where consent or licence has been given by a landowner to place a structure on the land, such licence affords a defence as against that owner only. The licence may be revoked by the owner, who then has the right to sue for continuing trespass if the structure is not removed within a reasonable
I time. See J G Fleming, *The Law of Torts* (Australia: The Law Book Co of Australia, 1957) at p. 45.

[136] The failure to remove a structure placed on another's land constitutes a continuing trespass. A subsequent transferee of the land can sue for continuing trespass (see Fleming *(supra)* at p. 45; *Hudson v. Nicholson* [1839] 151 ER 185 at p. 189; *Konskier v. B Goodman Ltd* [1928] 1 KB 421 at p. 426).

[137] Therefore in *Julaika Bivi v. Mydin* [1961] 1 LNS 37; [1961] 1 MLJ 310 at p. 312 where the defendant was in possession of part of a house with the previous owner's consent when the plaintiff acquired a temporary occupation licence ("TOL") over the house and the plaintiff sued the defendant for trespass, the High Court had no difficulty in holding that as against the original holder of the TOL the defendant was not a trespasser, but the title having been cancelled, the defendant then became a trespasser as against the plaintiff.

[138] In *Sin Heap Lee-Marubeni Sdn Bhd v. Yip Shou Shan* [2004] 4 CLJ 35; [2005] 1 MLJ 515 the defendant, in developing a residential and commercial complex, excavated deep slopes on its land encroaching onto the neighbouring land. The plaintiff subsequently came into possession of the neighbouring land and sued the defendant for trespass. The Court of Appeal in affirming the decision of the High Court held the defendant liable for trespass. It was observed that there was no evidence to show the previous registered owner consented to the defendant's act of trespass. In any event, such implied consent would only be a valid defence as against the previous owner, and only if the trespass had ceased when the plaintiff took possession of the land. The Court of Appeal opined as follows:

> 23. In the present appeal there was no evidence to show that the previous possessor (the previous registered owner) of the said land had any knowledge of the act of trespass committed by the appellant or that he condoned the trespass by the appellant. In my view, *the onus is on the appellant to show the trespass committed by them before the respondent came into possession of the said land had been permitted by the previous owner of the said land or that it was done with the full knowledge of the previous owner and he did nothing to stop it*. In such a situation the evidence of first incident would be relevant. Further, in my view, *it would only be valid as against the previous owner before he divested his possession of the said land. This would only be valid if the trespass had ceased when the respondent took possession of the said land*.
>
> 24. *The evidence before the court was that the act of trespass committed by the appellant continued after the respondent came into possession of the said land. This could be seen from the notice by way of a letter given by the respondent to the appellant to cease the trespass and to stop the excavation*. This letter was written in June 1991. By another letter dated 5 August 1991 by the respondent to the appellant whereby a survey was endorsed showing the extent of trespass committed by the appellant or their servants or agents. The reply from the appellant was also dated 5 August 1991 whereby they would instruct their surveyor to make a survey and settle the matter with the respondent. The survey by the appellant was only done in August 1992. This is clear evidence of continuing trespass even after the respondent came into possession of the said land. (emphasis added)

[139] The plaintiff wanted to make sure that it had gotten its facts right before writing to the defendants and when it was confirmed by its surveyor's report that the defendants' structures were indeed on the plaintiff's land, the plaintiff wrote to the defendants to enquire as to the exact nature of their interest in the lake with its related structures.

[140] The defendants could not immediately answer for their files had gone missing and so they tried to reconstruct it by enquiring from the local authority. Finally when they did reply nearly a year later in spite of reminders, the answer was that the previous proprietors had surrendered the land to the State and that in any event they had consented to the lake and its related structures being there. It was further emphasised that the defendants had constructed these structures for a public purpose for flood mitigation because of the constant flooding in the housing development there.

[141] The plaintiff gave notice to the defendants of the trespass by them and followed up with this suit when there was no solution in sight. The plaintiff had understood its right as registered proprietor to include the exclusion of others from its land unless it has expressly consented to it.

[142] In fact based on the high authority of the Federal Court in *Yap Lai Yoke v. Chin Fook Wah & Another Case* [1984] 2 CLJ 282; [1984] 1 CLJ (Rep) 452; [1984] 2 MLJ 274, the plaintiff understood its right as a registered proprietor to be far superior to whatever interest the State may assert which is not registered and so not reflected on the register document of title. The Federal Court had held as follows:

> Once the plaintiff has established his title and encroachment by the defendants the latter must show that they have better titles than the plaintiff in respect of the areas they were alleged to have encroached .... **Adverse possession by a person for however long a period does not extinguish the title of the registered proprietor nor does it in any way further his right to possession**. (emphasis added)

[143] Whilst it is true that the lake with its related structures have been on the land for more than 20 years, as far as the plaintiff is concerned, it had never consented to the defendants' structures to be on the land now in its name as the registered proprietor.

[144] The purchaser cannot be paying the full purchase price and yet be excluded from the free enjoyment of the whole of the land which it has now become its registered proprietor. What the plaintiff purchased is the whole of the land and not the land minus the lake of 14 acres.

[145] The plaintiff may have bought the land at a bargain but that is to its credit for after all it is a public auction sale where the reserved price is fixed based on the valuation report prepared by the chargee bank's valuer and generally the price is reduced by a further 10% each time the public auction is unsuccessful until the land is successfully sold.

[146] The fact that the plaintiff bought the land cheap is no justification that it must then not complain or be heard, much less take action against the defendants for being deprived of use of some 14 acres occupied by the lake with its related structures. The plaintiff could not use or have access to the lake as it is fenced-off by the defendants and effectively the plaintiff is able to use only the balance three acres of land surrounding the lake.

[147] There is no separate subdivided or partitioned title for the lake with its related structures. When the whole of the land is held under one title, it does not matter if the price of some RM3.7 million paid is more consistent with having an effective area of three acres that the plaintiff could put to use. The plaintiff cannot complain of the presence of the lake because the land was bought on an "as is where is" basis but it cannot be prevented from entering into the lake and to have free access to it consistent with its right of ownership of the land that includes the lake with its related structures.

[148] The learned Assistant State Legal Advisor in her submission referred to the valuation report by Henry Butcher to CIMB Bank wherein is stated that from the layout plan about 14 acres is a flood mitigation pond maintained by the first defendant. However that report is prepared for the purpose of CIMB Bank fixing the reserve price and not a report given to the plaintiff.

[149] Even if for argument sake there was intended to be a subdivision or partitioning of the land to, as it were, carve out the lake that could not be done without the chargee's consent. "Land" as defined in the definition section in s. 5 of the NLC includes:

> ...
>
> (d) **all things attached** to the earth or **permanently fastened to anything attached to the earth**, whether on or below the surface; and
>
> (e) **land covered by water**; ... (emphasis added)

[150] The definition of "land" is broad enough to cover the flood mitigation lake with its related structures and that includes its fencing together with the staff quarters, the pipes and pumps as well as the Tenaga sub-station. Alternatively if these things are removable as in not being permanently fastened to the earth, then it should be removed by the defendants upon receiving the plaintiff's notice to deliver possession and to remove the obstructing structures.

[151] The State's stand is that they were validly on the land because the previous owners had allowed them into the land and to do all works necessary for the flood mitigation project which saw the waters being directed into what can be now seen as the 14-acre lake in the 17-acre land.

[152] That argument is good as between the previous proprietors and the defendants. Such an agreement in contract between the contracting parties cannot bind a complete stranger who is now the new registered proprietor

with no prior knowledge of the antecedents of the land and whose reliance on the official land searches made before and after the auction sale cannot be faulted.

[153] Whatever is the arrangement or even contract between the previous proprietors and the defendants, it is for the defendants to enforce it against the previous proprietors. It does not affect the rights of registered ownership of the new proprietor. To ask the new proprietor in the plaintiff to take the land subject to the unregistered interest of the defendants would be to ask registered proprietor to recognise the unregistered interest not reflected on the title before the plaintiff became its registered proprietor.

[154] That would be to turn the Torrens system and with that the NLC on its head. There would be no certainty in land transaction for one does not know what are the interests affecting the land purchased at a public auction or for that matter from a previous proprietor. Section 215 NLC has provided as follows for certainty upon the registration of one's title against the land:

> 215. Form, and effect generally, of transfer of land
>
> (1) The transfer under this Act of any alienated land shall be effected by an instrument in Form 14A.
>
> (2) The title of the transferor shall pass to and vest in the transferee upon the registration of any such transfer, together also with the benefit of any registered interests then enjoyed with the land.
>
> (3) The transferee of any alienated land shall hold the same subject to:
>
> (a) any lease, charge **or other registered interest subsisting in respect thereof at the time the transfer is registered**;
>
> (b) subject to sub-section (3) of section 213, any tenancy exempt from registration granted by the transferor or any predecessor in title;
>
> (c) **all conditions and restrictions in interest** then applicable thereto; and
>
> (d) **all other matters then appearing on, or referred to in, the register document of title**. (emphasis added)

[155] The respondents' interest, whatever it may be, is not registered in the register document of title nor does it appear or is referred to in it.

[156] Perhaps the disturbing alarm can be better illustrated with a simpler example quite common in everyday life. A registered proprietor had taken a housing loan from a bank and so had charged the title to the house to the bank as a chargee. The registered proprietor had then let out the property to a tenant for a long term which the tenant did not bother to register in the land office. The rental income was enough for the owner to service his loan. However bad times came and the rental income had to be diverted by the owner to save his business and so he defaulted on his loan. The bank went

for an order for sale and the house was put up for public auction. The house was sold on an "as is where is" basis and the successful bidder having become its new registered proprietor, proceeded to exercise his right of vacant possession and notified the tenant to leave the house and to deliver up possession of it. The tenant refused and so the new registered proprietor brought an action for trespass and well as for vacant possession of the said house.

> ... the trespass committed by the appellant was still continuing.....In respect of this I would like to refer to *Cheah Kim Tong & Anor v. Taro Kaur* [1989] 3 MLJ 252 ... Peh Swee Chin J (as he then was) at p. 253 said:
>
> > Learned counsel for the plaintiff submitted that the trespass was a continuing one, and still continued. I agree with the submission about the continuing trespass. **In a continuing trespass a fresh cause of action arises *di die in diem*, ie, from day to day**. This would alone dispose the defendant's contention.
> >
> > (emphasis added)

[157] In *Terra Damansara Sdn Bhd v. Nandex Development Sdn Bhd* [2006] 8 CLJ 657; [2006] 6 MLJ 24 it was held that:

> **A trespass of this nature will only abate once the defendant removes the ground anchors**. It is a continuing trespass and successive actions will lie from day to day until the ground anchors are removed and in each action damages (unless awarded *in lieu* of an injunction: *Masters v. Brent BC* [1978] QB 841) are assessed up to the date of the action.
>
> (emphasis added)

[158] It was also argued by learned counsel for the defendants that s. 2 of the Public Authorities Protection Act 1948 applies which provides a three-year limitation to sue an authority for acts carried out in execution of their duties only. However for this limitation to apply the authority must be acting within their power. See the case of *Ngo Ong Chung & Ors v. Pengarah Tanah Dan Galian Perak Darul Ridzuan* [2013] 1 LNS 146 and the Federal Court case of *Lee Hock Ning v. Government Of Malaysia* [1972] 1 LNS 66.

[159] The State cannot be said to be acting within its powers when it continues to allow the lake with its related structures to be on the land without the consent of the registered proprietor, the plaintiff and refusing to pay any compensation for such an action.

[160] Likewise laches does not apply to bar the plaintiff's claim. After becoming its registered proprietor the plaintiff commissioned a licensed surveyor to prepare a report on the exact perimeter of the land to satisfy itself that the defendants' fenced-off lake and its related structures are indeed on the land. Juruukur Khidmat Setia carried out the survey on 11 July 2011 and duly confirmed the encroachment. See appeal record vol. 3A, pp. 321 to 324.

[161] The plaintiff treaded cautiously in ensuring that it does not make any unsupported accusations against the defendants. It commissioned Knight Frank Malaysia Sdn Bhd ("Knight Frank"), a real estate consultancy firm, to find out the defendants' right to be on the land.

[162] Knight Frank wrote on 15 April 2013 to the first defendant to enquire if there was any approval for acquisition or acquisition of the land for the lake and its related structures but there was no reply. See appeal record vol. 3A, pp. 325 to 333.

[163] They again wrote on 13 May 2013 to the first defendant enquiring the chronology of events before and after the land was alienated to the previous proprietors and if there was any approval for acquisition or acquisition of the land but again there was no reply. See appeal record vol. 3A, p. 334.

[164] They again wrote, this time to the Jabatan Perundangan Majlis Bandaraya Shah Alam on 27 August 2013 highlighting that there was no endorsement on the title that the land is to be used for the flood mitigation lake and its related structures. Again there was no reply. See appeal record vol. 3A, pp. 345 to 346.

[165] The plaintiff persevered with a further letter dated 27 September 2013 to the first defendant requesting for information and documents justifying the building of the lake and its related structures on the land. Again there was a deafening silence. See appeal record vol. 3A, pp. 345 to 346.

[166] The reply that came some six months later from the date of the first letter was non-committal and in effect saying they need to gather more information and that a meeting would be called once the relevant information and documents were obtained. See appeal record vol. 3A, p. 347.

[167] Where the defendants themselves do not know of the exact nature of their own interest in the land when they should have immediate access to all relevant documents that are retrievable at their command, the plaintiff cannot be faulted for not knowing the interest of the defendants as nothing was indicated in the many official land searches done both before and after the purchase of the land.

[168] By a letter dated 11 September 2014 the first defendant made the admission that the process to change the conditions of the land could not be done as the title was with the chargee bank. See appeal record vol. 3A, pp. 441 to 442.

[169] As the documents were not forthcoming from the defendants despite their promise to do so a year ago on 25 October 2013 the plaintiff was constrained if not compelled to file an originating summons in the Shah Alam High Court in OS No. 24-1381-12-2914 on 10 December 2014 against the first and second defendants for documents pertaining to the planning,

approval and or acquisition of the land. See appeal record vol. 3A, pp. 351 to 354. The High Court ordered the first and second defendants to provide the documents to the plaintiff.

[170] From the documents disclosed it was ascertained that the flood mitigation lake and its related structures was to be built on Lot 18909 and Lot 38618 and not on the land (held under Lot 18903).

[171] In the light of all the letters written by the plaintiff or on its behalf by Knight Frank and the discovery action in the originating summons leading to this suit filed in March 2017, it can hardly be said that the plaintiff had been guilty of laches or that it had acquiesced in the defendants' presence and occupation of the land.

[172] If at all the defendants should have been candid from day one when enquiries were made on the status of the land to be upfront about what had happened so that the plaintiff is not placed in a position of utter uncertainty with respect to its right of free enjoyment of the entire land of which it is its registered proprietor. No one should have to apply for discovery of documents from the organs of the State when they cannot explain the nature of their unregistered interest on the land.

[173] The reluctance of the defendants to disclose the relevant documents is more attributable to the fact the documents do not show the consent of the previous proprietors to surrender the land in question but rather a different piece of land and even then the surrender was for a development that did not proceed and the approved development plans would have expired after a year.

[174] At any rate where there is continuing trespass, no laches, acquiescence nor estoppel would apply to extinguish one's title or interest in land as provided in s. 341 NLC as follows:

> Adverse possession of land for any length of time whatsoever shall not constitute a bar to the bringing of any action for the recovery thereof by the proprietor or any person or body entitled to an interest therein and accordingly the Limitation Act 1953 shall in no circumstances operate to extinguish any title to, or interest in, land.

[175] The Court of Appeal in *Ahmad Shazilly Ismail Bakti v. Nik Salma Zaidah Hj Wan Mohd Zaid* [2014] 5 CLJ 817 applied both the concept of indefeasibility of title and the concept of non-applicability of adverse possession to preserve the right of a registered proprietor to assert his right over his land as follows:

> [89] We further note that the defendant in her pleading and testimony had claimed that she had been staying in the house since it was constructed in 1985 and has the right to remain on the said house and the said land. In our view, *the idea of a gratuitous licensee being able to occupy an alienated land owned by someone else permanently or perpetually, after being*

A *given due notice to quit, is repugnant to the concept of indefeasibility of title of a registered proprietor as provided under s. 340 and the concept against adverse possession of land by occupation*, as explicitly stated in s. 341 of the NLC ... (emphasis added)

Whether The Remedy Of The Plaintiff Should Be Confined To Damages
B **To Be Assessed For The Defendants' Trespass And Compensation To Paid For The Continuing Presence Of The Defendants' Structures On The Land**

[176] Where trespass is concerned it does not quite matter whether the trespasser is a state body or corporation. They have a team of legal advisors to advise them and if they have not taken the necessary steps to reflect their
C interests against the land then they cannot be heard to complain that the new registered proprietor who bought the land at a public auction must recognise their interest because anyone having a cursory look at the said land would have seen the structures and systems put up by the State and its authorised bodies for a public purpose to mitigate flooding.

D **[177]** It is for the State to go against the previous proprietors of the land but as between the current new registered proprietor of the land the defendants do not have the plaintiff's consent to occupy it nor to have its structures and systems with respect to flood mitigation to be on the land.

E **[178]** Whilst ordinarily a court of law would be able to order for the structures and systems of the trespasser to be removed, here this court must of necessity take into account the public purpose served by the lake and the structure and system of pumps and pipes as well as the staff quarters to house the staff of the State for the work of flood mitigation.

F **[179]** Granted these are for a public purpose in which case they are allowed to enter the land for the purpose of maintaining it under the NLC but they would have to negotiate with the new proprietor to rent or lease or pay compensation for the affected parts of the land held in one title for the continued presence of these structures and systems.

G **[180]** Even if the continuing presence of the defendants' structures on the land is not trespass because of the over-riding public purpose to be discharged by the State in maintaining and monitoring the flood mitigation lake with its system of pumps, pipings and power supply through its staff permanently stationed there, there is still a need to make reasonable compensation to the
H plaintiff for the presence of the offending structures on the land.

[181] Thus in *One Visa Sdn Bhd v. Telekom Malaysia Bhd* [2015] 10 CLJ 569; [2015] 7 MLJ 104, despite finding the defendant not liable in trespass and declining to award damages, the High Court nevertheless ordered the defendant to pay the plaintiff a monthly rental "in the interest of justice". The
I rental was for the portion of the lands occupied by the offending infrastructure, calculated from the time the plaintiff became the registered proprietor until the time the defendant removed its infrastructure.

[182] Here the structures are not amenable to removal as the massive flood mitigation lake is designed to prevent flooding in the township and in any event no permanent injunction shall lie against the Government.

[183] Under s. 7(2) of the Government Proceedings Act 1956, the construction and maintenance of flood prevention works is expressly included as part of the "exercise of public duties" by the Government. The effect of the section is that no proceedings, except suits for damages or compensation arising out of negligence and trespass, can lie against the Government in the exercise of its public duties. Section 7 in its entirety reads as follows:

> Savings of acts done in exercise of public duties
>
> 7. (1) Notwithstanding any other provisions of this Act to the contrary no proceedings, other than proceedings for breach of contract, shall lie against the Government on account of anything done or omitted to be done or refused to be done by the Government or any public officer in exercise of the public duties of the Government.
>
> (2) For the purposes of subsection (1) the expression "exercise of the public duties" includes:
>
> (a) the construction, maintenance, diversion and abandonment of railways, roads, bridle-paths or bridges;
>
> (b) the construction, maintenance and abandonment of schools, hospitals or other public buildings;
>
> (c) *the construction, maintenance and abandonment of drainage, flood prevention* and reclamation works; and
>
> (d) the maintenance, diversion and abandonment of the channels of rivers and waterways.
>
> (3) *Nothing in this section shall prevent the bringing of any suit for damages or compensation arising out of negligence or trespass in the execution of any works of construction or maintenance undertaken by the Government in the exercise of the said public duties.*
>
> (4) Nothing in this Act shall subject the Government, in its capacity as a highway authority, to any greater liability than that to which a local authority is subject in that capacity. (emphasis added)

[184] The learned Assistant State Legal Advisor also referred to ss. 57 and 58 NLC. These two sections read as follows:

> 57. General
>
> CHAPTER 3
>
> RIGHTS OF ACCESS TO, AND USE OF, ALIENATED LANDS
>
> (1) Subject to sub-section (2), the State Authority shall have in respect of all alienated land such rights of access and use as are conferred by the following provisions of this Chapter.

(2) *The said rights shall be exercisable in relation to any land to the extent only that their exercise in any particular respect is not inconsistent with any express provision in the document of title thereto*.

(3) The rights conferred by this Chapter shall be in addition to, and not in derogation of, any right of entry onto, or use of, land exercisable by or on behalf of the State Authority under any other written law for the time being in force.

58. Nature and extent of rights

(1) The State Authority may carry, make or install, and thereafter inspect, use, maintain, repair, remove or re-lay, in, through, over, under or across any alienated land, any drain, sewer, pipe, cable or wire for the passage of water or any other substance, together with all necessary supports and any works ancillary thereto:

Provided that the State Authority shall not be entitled under this section to interfere with any building lawfully erected on any such land.

(2) Any officer or other person or authority appointed by or acting on behalf of the State Authority *shall have free access to any alienated land at all reasonable times* for the purpose of surveying, setting out or marking the line of any drain, sewer, pipe, cable or wire, or for any of the purposes specified in subsection (1). (emphasis added)

[185] The above provisions cannot be used to permanently deprive the registered proprietor of its enjoyment of the land and everything in it and the presence of the defendants is more of an intermittent nature where reasonable access is being sought. Therefore s. 59 NLC was put in place to address the need for issuance of "notice of intended works". It is clear that in carrying out the emergency and necessary works the State shall not act in any manner inconsistent with the express provision in the title of the registered proprietor under s. 57(2) NLC.

[186] Indeed to allay all fears there is provide in s. 61 compensation to the proprietor of the land as follows:

61. Compensation.

Where **any land**, tree or crop is damaged or destroyed in the exercise of any power conferred on the State Authority by the provisions of this Chapter, **the proprietor of the land** or, as the case may be, the owner of the crop **shall be paid such compensation as may be agreed or determined in accordance with the provisions of section 434**. (emphasis added)

[187] The plaintiff had prayed for an injunction to restrain the defendants from trespassing onto the land and for a further order that the defendants do remove the fencing and other structures on the land and to restore the land to its previous condition before those structures were erected.

[188] To order the State and its agents to remove the flood mitigation structures and systems would be out of question altogether, not just because of the higher consideration that this court must properly give to the public purpose being served in flood mitigation and prevention as stated above but also because of the prohibition found in s. 29(1) of the Government Proceedings Act 1956 as follows:

> Nature of relief
>
> 29. (1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> Provided that:
>
> (a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, **the court shall not grant an injunction or make an order for specific performance, but may *in lieu* thereof make an order declaratory of the rights of the parties**; and
>
> (b) in any proceedings against the Government for the recovery of land or other property **the court shall not make an order for the recovery of the land or the delivery of the property**, but may *in lieu* thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof.
>
> (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government. (emphasis added)

[189] See the Court of Appeal case of *Pengarah Tanah Dan Galian Negeri Johor v. YKK (Malaysia) Sdn Bhd* [2019] 7 CLJ 178. Section 29 of the Government Proceedings Act 1956 does not permit the granting of any permanent injunction against the Government. Section 54 of the Specific Relief Act 1950 also prohibits the grant of an injunction against any Government department.

[190] While the law does not require anyone to be altruistic and self-sacrificing, it does require in some instances, like in the present case, that some restrictions may have to be endured for the public good but always that fair compensation be made to anyone who has to so suffer as a result. In the present case it is suffering the structure of the State to be on one's land to serve a public purpose. Article 13 of the Federal Constitution protects and preserves one's property rights as follows:

A Rights to property

13. (1) No person shall be deprived of property save in accordance with law.

[191] To be deprived of use of one's property or any part thereof would be sufficient encroachment that cannot be excused without payment of a reasonable rental and where parties cannot agree on the amount, it cannot be justified without a fair compensation to be determined by the court.

[192] Having carefully considered the evidence adduced before the trial judge which material facts cannot be seriously disputed, the question at the end of the day boils down to a proper judicial appreciation of the evidence before the trial court and the application of the relevant law.

[193] It is trite law that an appellate court will not intervene unless the trial court had been shown to be plainly wrong in arriving at its decision or where there had been no or insufficient judicial appreciation of the evidence. See *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 (CA) and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1 (FC) at pp. 10 to 11 where the Federal Court affirmed the Court of Appeal's decision in setting aside the judgment of the High Court on the issue of the validity of a will as follows:

11. In gist, the pivotal question raised by the appellants was whether the term 'insufficient judicial appreciation of the evidence' used by the Court of Appeal constituted a new test for appellate intervention. We think it is important to examine this proposition in the light of what the Court of Appeal had said in its judgment beginning from para 27 which we have reproduced earlier but repeated herein for the purpose of emphasis. It states:

> ... Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think, appropriate that we say what judicial appreciation of evidence involves.

[194] For the reasons given above I am confident that this case calls for appellate intervention on appeal as there was no proper and valid surrender of the land to the State that is binding on the plaintiff who has not at any time consented to the fenced-off lake and its related structures to be on the land that it bought at a public auction pursuant to an order for sale by the land Administrator and which it had satisfied itself from official land searches made that the land is free from all encumbrances.

Pronouncement

[195] I would allow the plaintiff's prayer for a declaration that it is the registered proprietor of the land and that the defendants' flood mitigation lake and its related structures on the land constitute a trespass and that in any event compensation is payable by the defendants to the plaintiff for the presence of the lake (fenced-off by the defendants) and its related structures on the plaintiff's land.

[196] The plaintiffs and the defendants are enjoined to discuss and agree on a reasonable rent or compensation to be paid to the plaintiff, failing which the plaintiff is at liberty, at the assessment of damages stage, within 30 days from the order of this court, to apply to the High Court Judge to determine a proper and reasonable lease rental or compensation based on the expert valuation reports that both the plaintiff and the defendants may produce before the High Court.

[197] At any time if the State should be of the view that to compulsorily acquire the land for a public purpose would be more economical in the long run, then they are at liberty to proceed accordingly.

[198] The damages to be assessed would be the loss of lease rental or compensation for the use of the part of the land occupied by these structures including the fenced-off area of the lake.

[199] I would therefore make an order for assessment of damages for trespass or alternatively compensation to be paid by the defendants jointly and severally and that the matter be referred to the High Court Judge to assess damages or compensation based on the expert valuation reports that may be submitted and that the High Court do further determine the amount to be paid to the plaintiff/appellant for past encroachment from the date of the writ to the date of assessment and thereafter the appropriate annual payment to the plaintiff/appellant to be paid by the end of January for each year for the continuing presence and use of the land and its related structures by the defendants/respondents.

[200] Interest shall be at 5% per annum from the date of writ to realisation.

[201] The counterclaim of the defendants/respondents is for a declaration that the land had been surrendered to the third defendant/respondent and that they are entitled to damages to be paid by the plaintiff/appellant and further that the plaintiff/appellant shall be liable for the construction costs of the lake with its related structures. In the light of my decision on the plaintiff's claim, the defendant's counterclaim has to be correspondingly and consequentially dismissed and the order of the High Court is set aside.

[202] I order costs of RM30,000 to be paid by the defendants/respondents to the plaintiff/appellant. Deposit to be refunded if any.